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No. 96-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

IBP, INC. AND DIANE ARNDT,

Petitioners,

v.

KEVIN WILSON,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Iowa

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the $2 million punitive damage award imposed by the Supreme Court of Iowa to punish conduct resulting in $4,000 in presumed harm should be summarily reversed because it so plainly violates the Due Process Clause of the Fourteenth Amendment as interpreted by this Court in *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996), which struck down as unconstitutional a $2 million punitive damage award imposed by the Supreme Court of Alabama to punish conduct resulting in $4,000 in actual harm.

2. Whether the Due Process Clause of the Fourteenth Amendment prohibits a State from allowing a private plaintiff to pursue punitive damages where, as here, the State collects a 75 percent share of the punishment and pays the plaintiff's attorney's fees out of the punishment.

PARTIES INVOLVED AND RULE 29.6 STATEMENT

All parties in the court below are listed in the caption to this petition. IBP, inc. is publicly traded on the New York Stock Exchange. It has no parent corporation or nonwholly-owned subsidiary.

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PETITION FOR WRIT OF CERTIORARI

IBP, inc. and Diane Arndt (jointly referred to as "IBP") petition this Court for a writ of certiorari to review the judgment in this case of the Supreme Court of Iowa.

OPINIONS BELOW

The opinion of the Supreme Court of Iowa, released December 18, 1996, is reprinted at Appendix ("App.") 1a-34a, and is reported at 558 N.W.2d 132 (Iowa 1996). That Court's February 14, 1997 order denying rehearing is reprinted at App. 35a, and is unreported. The trial court's order granting in part IBP's alternative motions for Judgment Notwithstanding the Verdict, New Trial and

Remittitur, filed on March 2, 1995, is reprinted at App. 37a-46a, and is unreported.

JURISDICTION

The Supreme Court of Iowa released its opinion in this case on December 18, 1996, explicitly addressing the propriety of the $2 million punitive damage award under the Due Process Clause. IBP filed a timely petition for rehearing. On February 14, 1997, the Supreme Court of Iowa denied the petition for rehearing. This petition for certiorari is being filed within 90 days of that denial. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment provides in relevant part: "[N]or shall any State deprive any person of . . . property, without due process of law . . . ."

STATEMENT OF THE CASE

A. Factual Background

Respondent Kevin Wilson was working at the Council Bluffs, Iowa, plant of petitioner IBP, inc., when he injured his back on March 15, 1991. (Tr. 18-19) IBP is self-insured for workers compensation purposes. (Tr. 196) Mr. Wilson's care was coordinated by Karen Beam, who was the plant's workers compensation coordinator, and petitioner Diane Arndt, a nurse who was the manager of the plant's occupational health services. Mr. Wilson was referred the day after his injury to Dr. A.K. Agarwal, an orthopedic surgeon. (Tr. 20-21; 101) Dr. Agarwal

diagnosed pulled muscles and prescribed bed rest with a return to light duty on March 19. (Tr. 22; Exh. 26)

Mr. Wilson reported for light duty as directed, but soon went to the dispensary complaining of back pain. The dispensary records show that Mr. Wilson did not have the pain medicine that Dr. Agarwal had prescribed and that he reported not having taken it regularly. (Exh. 21) Contacted by phone, Dr. Agarwal approved the light duty that had been assigned to Mr. Wilson and suggested that Mr. Wilson alternate between standing and sitting. (Exh. 21) Mr. Wilson refused to return to duty and left the plant. (Exh. 21) The examining nurse reported that Mr. Wilson performed some bending and twisting movements without difficulty, and plant security observed Mr. Wilson walking without difficulty as he left. (Exh. 21)

Mr. Wilson saw Dr. Agarwal again on March 23, but was unhappy with the doctor's recommended treatment of medication and physical therapy. (Tr. 24-25) At Mr. Wilson's request, he was referred to Dr. William Hamsa, another orthopedic surgeon. (Tr. 155; Exh. 6) Dr. Hamsa examined Mr. Wilson on April 1, diagnosing an unstable disk and prescribing bed rest. (Exh. 24, at 6, 10-12) At follow-up visits on April 12 and April 26, Dr. Hamsa found improvement, but continued to recommend bed rest. (Exh. 19, at 2) Although Dr. Hamsa expected that Mr. Wilson would have to attend to some routine activities such as eating, his basic advice to Mr. Wilson was "to stay down, get gravity off his back." (Exh. 24, at 12-13)

Mr. Wilson had not returned to work since walking off the job on March 19. On April 2, the plant's workers' compensation coordinator, Karen Beam, requested that corporate security do an activity check on Mr. Wilson during the bed rest period prescribed by Dr. Hamsa. (Tr. 227-28) A similar request was made by Ms. Beam's supervisor, based on a report from Mr. Wilson's mother

that Mr. Wilson was not taking his medication and was not observing his restrictions. (Exh. 16) Such requests reflected standard corporate procedure when an employee reported an injury that could result in a high dollar-value claim or a substantial loss of work days. (Tr. 84, 135) Activity checks were intended to--and often did--expose fraudulent workers' compensation claims. (Tr. 135)

The activity check resulted in numerous sightings of Mr. Wilson driving around town. (Exh. 12) On May 6, Ms. Arndt called Dr. Hamsa and told him, according to Dr. Hamsa's contemporaneous notes, that "videotape has been obtained of Mr. Wilson working on his car and out doing other activities without any apparent distress." (Exh. 19) Although there was a videotape of Mr. Wilson, which was admitted at trial, it did not show him working on his car. (Exh. 17)[1]

At Mr. Wilson's next appointment with Dr. Hamsa on May 17, Mr. Wilson showed continued improvement. (Tr. 45; Exh. 19) Upon being advised by Dr. Hamsa that he was ready to return to light duty, however, Mr. Wilson accused Dr. Hamsa of being an employee of IBP. (Exh. 19) When Dr. Hamsa informed Mr. Wilson that IBP had "documented evidence that he has been out and not following" Dr. Hamsa's advice, Mr. Wilson admitted that "he was out paying bills or looking after his children as well as other activities." (Exh. 19)

Because Mr. Wilson was not satisfied with the care he received from Dr. Hamsa, he was referred by Ms. Arndt to a third doctor--this time a neurologist, who agreed with Dr. Hamsa that light duty was appropriate. (Tr. 34-35; Exh.

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[1] It is unclear whether Ms. Arndt was aware of the existence of the tape at the time she called Dr. Hamsa, and the jury apparently concluded that she was not.

19) Although Mr. Wilson had by that time finally returned to work, Ms. Arndt referred him to yet another doctor--a neurosurgeon who offered Mr. Wilson the option of surgery, which was accepted. (Tr. 37; Exh. 30; Exh. 25) The surgery was successful. (Exh. 25)

Following the surgery, Mr. Wilson never returned to work at IBP. (Tr. 54-55) He has stipulated that he received a full and fair workers' compensation settlement for his injury. (Tr. 317)

B. Proceeding In The Courts Below

Mr. Wilson brought suit against IBP and Ms. Arndt, claiming, *inter alia,* that Ms. Arndt slandered him by falsely telling Dr. Hamsa that there was a videotape that showed him working on his car and doing other activities when he was supposed to be on bed rest and that Ms. Arndt breached a fiduciary duty to him by giving the doctor inaccurate information relating to Mr. Wilson's condition. After a two day trial, and after Mr. Wilson's counsel, in his rebuttal closing argument, had informed the jury--over IBP's objection--that the State would receive 75 percent of any punitive damage award (Tr. 336), the jury found in favor of Mr. Wilson on both claims, awarding $4,000 in presumed compensatory damages and $15 million in punitive damages.

In its post-trial motions, IBP contended, among other things, that there was no evidentiary basis for any compensatory damages and that the punitive damage award was grossly excessive and the product of passion and prejudice. Defendants' Motion for Judgment Notwithstanding the Verdict, Alternative Motion for New Trial, and Request for Oral Argument at 1-3. The trial court, in its March 2, 1995 order, rejected IBP's argument with respect to compensatory damages. The court found that IBP had committed "slander per se" and therefore

respondent did not have to "prove . . . damage to prevail in such an action" because slander per se "is presumed to have slanderous effect." App. at 40a. The trial court also found that the evidence supported a verdict that Ms. Arndt's allegedly slanderous statements to Dr. Hamsa "disrupted" respondent's relationship with Dr. Hamsa, and that respondent "suffered a loss of reputation" at least "in the eyes of Dr. Hamsa . . . as a result of the communication." *Id.* at 42a.

The trial court, citing, *inter alia*, this Court's decisions in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993); *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991); and *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), held that the $15 million punitive damage award was "grossly excessive and bear[s] no reasonable relation to the Plaintiff's actual damages," App. at 44a-45a, and was "likely the result of passion or prejudice on the part of the jury." *Id.* at 45a. The court emphasized that the punitive damages could only be imposed against IBP in this case "based upon the conduct 'from which the claim arose.'" *Id.* (citing *Coster v. Crookham*, 468 N.W.2d 802, 810 (Iowa 1991); *Burke v. John Deere Co.*, 6 F.3d 497, 507, 511 (8th Cir. 1993), *cert. denied*, 510 U.S. 1115 (1994)). The court found that IBP's conduct giving rise to the claim in the instant case "is not so egregious to warrant such a large award. Quite simply, an award of $15,000,000 does not bear any reasonable relation to the harm or even the potential harm to the [Plaintiff] resulting from the statements of defendant Arndt to Dr. Hamsa." *Id.*

Consequently, the trial court granted a new trial on punitive damages unless Mr. Wilson accepted a remittitur of the punitive award to $100,000, "a sum [that] is 25 times the amount of the Plaintiff's actual damages, according to the jury's compensatory damage award." App. at 45a. The

court concluded that such a punishment "reflects a more reasonable relation between the two awards and still succeeds in punishing the defendant[s] and deterring future similar conduct." *Id.* When Mr. Wilson did not accept the remittitur, the trial court ordered a new trial.

Mr. Wilson then appealed to the Supreme Court of Iowa from the order granting a new trial, and IBP and Ms. Arndt cross-appealed on a variety of issues. Like the trial court, the supreme court rejected IBP's argument that there was no basis, as a matter of law, for awarding *any* compensatory damages. The court declared that "[s]lander per se . . . is actionable without proof of damage." App. at 12a. The court also noted that "Wilson testified that as a result of the incident, he was unable to return to work because of lack of self-esteem and distrust of his employer, and that he suffered damage to his reputation as a result of Arndt's statements." *Id.* Based on this analysis, the court held that there was "sufficient evidence . . . to support submission of the damage claim and the jury's verdict." *Id.*

Mr. Wilson's appeal was from the unconditional grant of a new trial that resulted from his failure to accept the remittitur set by the trial court; neither the conditional new trial order nor the $15 million jury verdict was before the supreme court for review. Although it affirmed the trial court's ruling that the $15 million punitive award was excessive, the supreme court ruled that the remittitur of the punitive damage award in the conditional new trial order should be *increased* from $100,000 to $2 million, leaving a 500 to 1 ratio between the punitive damage award and the $4,000 presumed compensatory award--the exact punitive and compensatory amounts and ratio that this Court found to be a "breathtaking" indicator of unconstitutionality in *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996). Despite purporting to apply *BMW*, the Iowa Supreme Court found this ratio to be of "minor

significance." App. at 32a. The court below also did not even mention the third *BMW* guidepost, which requires comparison of the punitive damage award to civil and criminal penalties for comparable conduct. 116 S. Ct. at 1603.

Moreover, even though this Court in *BMW* did not rely on the defendant's financial status to assess the constitutionality of the $2 million award in that case and held that one State could not punish lawful out-of-state conduct, the Iowa Supreme Court in the instant case interpreted this Court to have "approved" its reliance on IBP's wealth and international business activities. App. at 32a. Therefore, in increasing the award twenty-fold, the court emphasized:

> IBP is the largest producer of fresh beef and pork in the world. It operates eighteen separate beef or pork plants in nine states, as well as nineteen other plants, warehouses, tanneries and refineries. The company has a sales network of ten regional and international service centers in the United States, Europe, and Asia. IBP employs 29,000 people, had net sales in 1993 of $11.6 billion and had a net worth of $600 million.

App. at 32a-33a.

Despite the fact that no judgment had ever been entered on any punitive damage award, the Iowa Court "affirmed" "judgment for punitive damages in favor of plaintiff against defendant IBP . . . in the amount of $2 million if plaintiff agrees to a remittitur of all punitive damages exceeding that amount." App. at 33a. Pursuant to "the statutory directive of Iowa Code section 668A.1(2)(b)," the court held that, whatever remained of the punitive damage award after

payment of respondent's "attorney fees applicable to the recovery of the $2 million award" and payment of 25 percent of the award to respondent himself, must be paid into the State's "Civil Reparations Trust Fund." App. at 33a-34a.[2]

In their petition for rehearing, IBP and Ms. Arndt challenged the constitutionality of the $2 million penalty, arguing that it was utterly inconsistent with *BMW*. The Iowa court denied the petition without opinion on February 14, 1997. App. at 35a.

After the case was remanded to the trial court, respondent accepted the remittitur. Petitioners opposed entry of judgment, on the ground that the $2 million penalty violated the Due Process Clause of the Fourteenth Amendment and the Excessive Fines Clause of the Eighth Amendment. The trial court nonetheless entered judgment on April 30, 1997, allocating the punitive damage award as follows: 40 percent to plaintiff for his attorney fees; 25 percent to plaintiff; and the remainder to the State. App. at 48a.

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[2] Section 668A.1(2)(b) provides in relevant part that "after payment of all applicable costs and fees, an amount not to exceed twenty-five percent of punitive or exemplary damages awarded may be ordered paid to the claimant, with the remainder of the award to be ordered paid into a civil reparations trust fund administered by the state court administrator."

REASONS FOR GRANTING THE WRIT

A. The Court Should Grant Certiorari And Summarily Reverse Because The $2 Million Penalty Imposed Below Is Clearly Contrary To *BMW*

Summary reversal is appropriate in "palpably clear cases of constitutional error." *Eaton v. City of Tulsa*, 415 U.S. 697, 707 (1974) (Rehnquist, J., dissenting). A lower court decision that is clearly inconsistent with a constitutional ruling of this Court is such a "palpably clear" error. *See, e.g., Lambert v. Wicklund*, 117 S. Ct. 1169 (1997); *Florida Dep't of Health & Rehabilitative Servs. v. Florida Nursing Home Ass'n*, 450 U.S. 147 (1981). The decision of the Iowa Supreme Court in this case is plainly irreconcilable with the constitutional limits on punitive damages articulated by this Court in *BMW* and should be summarily reversed.

1. The Iowa Supreme Court's Assessment Of A $2 Million Penalty In This Case Is Flatly Inconsistent With *BMW*

The punitive damage award settled upon by the Iowa Supreme Court is clearly unconstitutionally excessive when measured against each of three *BMW* guideposts--a result of that court's flouting of those guideposts. Moreover, not once in its opinion did the Iowa court consider whether IBP had "fair notice" of the severity of the penalty that the court decided to impose, as required by *BMW*. *See BMW*, 116 S. Ct. at 1598. The $2 million penalty in this case therefore must be reversed for the same reasons as was the $2 million penalty in *BMW* itself.

With regard to the first *BMW* guidepost--reprehensibility of the alleged misconduct--Ms. Arndt's allegedly

slanderous statements to Dr. Hamsa were "not sufficiently reprehensible to warrant imposition of a $2 million exemplary damages award." *BMW*, 116 S. Ct. at 1601. The statements were made only to Doctor Hamsa, caused Mr. Wilson no physical, emotional or even economic injury and were in large part true, as Mr. Wilson himself admitted both to the doctor and at trial that he had not remained in bed when advised to do so. (*See* Tr. 32-33; Exh. 19)[3] And it is undisputed that Mr. Wilson ultimately received all the medical treatment that he requested.

Moreover, the IBP conduct that the court below cited as justifying punitive damages consisted entirely of legal conduct designed to preclude workers' compensation waste and fraud, which the court nevertheless concluded created a "climate of suspicion toward the legitimacy of injuries to workers." App. at 22a. This "climate" included IBP's preference for "ultraconservative physicians" to treat injured workers--without any allegation that such doctors violated any applicable standard of care in any case, much less Mr. Wilson's; that IBP occasionally conducted surveillance of injured workers--without any allegation that such surveillance violated any law; and that workers who did not cooperate with their treatment plans were assigned to light duty--again, without any allegation that such assignments violated any law. *See* App. at 22a. Indeed, on the issue of surveillance of personal injury claimants, other courts have held that "there is much social utility to be gained from these investigations. It is in the best interests

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3 In fact, Mr. Wilson was in jail for at least part of the time that he was supposed to be on bed rest. (Tr. 5) Although the jury was not apprised of that fact because it was deemed unduly prejudicial (Tr. 6), the court surely could take it into account in assessing the reprehensibility of Arndt's communication to Dr. Hamsa that Mr. Wilson was not complying with the doctor's instructions.

of society that valid claims be ascertained and fabricated claims be exposed." *Forster v. Manchester*, 189 A.2d 147, 150 (Pa. 1963); *see also Johnson v. Corporate Special Servs., Inc.*, 602 So. 2d 385, 388 (Ala. 1992) (holding that individual filing workers compensation claim "should have expected a reasonable amount of investigation into his physical capability"); *McLain v. Boise Cascade Corp.*, 533 P.2d 343, 346 (Or. 1975) ("It is well established that one who seeks to recover damages for alleged injuries must expect that his claim would be investigated . . . ."). A "climate" created by conduct that not only is not unlawful, but in fact has "much social utility," cannot possibly evince the level of reprehensibility necessary to support any punishment, much less a multimillion dollar award. *See BMW*, 116 S. Ct. at 1597 n.19 ("'To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort.'") (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978)).

The Iowa Supreme Court vaguely suggested that "[t]he evidence indicated that Mr. Wilson's treatment as an injured worker was not a one-time or isolated instance" and that "[o]ther workers with injuries could be profoundly affected as a result of the policy actions carried out by Arndt and IBP." App. at 32a. Yet, the Iowa court points to no evidence in the record--because there is none--suggesting that any "slanderous" statement had been made to the doctor of any other injured worker. Moreover, there is absolutely no evidence that any other worker suffered any harm from the actual conduct at issue in this case or that any worker had suffered any harm remotely similar to that claimed by Mr. Wilson, or even that any worker had been injured in any other way by the purported "climate of suspicion." The Iowa court, in effect, improperly "justif[ied] the award of punitive damages in [this] particular case by overlooking the actual events and focusing on potential victims of similar *hypothetical* torts."

Pulla v. Amoco Oil Co., 72 F.3d 648, 659 (8th Cir. 1995) (White, J.) (emphasis in original); *see also Continental Trend Resources, Inc. v. OXY USA Inc.*, 101 F.3d 634, 639-40 (10th Cir. 1996) ("In figuring harm both actual and potential harm may be considered. But it must be harm to these plaintiffs, not others."), *petition for cert. filed*, 65 U.S.L.W. 3675 (U.S. Mar. 31, 1997) (No. 96-1546).

The Iowa Supreme Court also ignored this Court's admonition in *BMW*: "That conduct is sufficiently reprehensible to give rise to tort liability, and even a modest award of exemplary damages, does not establish the high degree of culpability that warrants a substantial punitive damages award." 116 S. Ct. at 1601. The Iowa court did not make any effort to calibrate the degree of reprehensibility of the conduct here.

Indeed, although the court stated that the "extent and nature of the outrageous conduct is considerable when compared with other cases that have assessed the reprehensibility of defendants' acts," App. at 32a, it did not actually cite any such cases or the amount of punitive damages imposed in such cases.[4]

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[4] The court's discussion of the facts of the case contains several fundamental inaccuracies. First, the court asserts that no videotape existed, *see* App. at 19a, when in fact there was a videotape, which was entered into evidence. (Tr. 231; Exh. 17) Second, the court states that Ms. Arndt admitted making up the story about the videotape, App. at 20a, when in fact she testified at trial that the corporate claims adjustor, Geri Collins, had told her before she made the call to Dr. Hamsa that there was a video. (Tr. 272, 286) Ms. Arndt also specifically denied having told Dr. Hamsa that the video was of Mr. Wilson working on his car. (Tr. 271) Third, the court refers to Karen Beam--the almost exclusive source of such allegations as that IBP preferred "ultra-conservative" physicians (*see* Tr. 69)--as being a nurse, *see* App. at 20a (referring to Beam as a "nurse colleague" of

If the court had actually looked to other Iowa punitive damage cases, it would have found that the *highest* punitive damage award *ever* affirmed in a reported appeal was 25 percent *less* than the $2 million penalty imposed here and was assessed in a personal injury case in which the plaintiff died as a result of the defendants' alleged tortious conduct and in which compensatory damages totaled more than $1.4 million. *See Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854, 857 (Iowa 1994) (affirming punitive damage award of $1.5 million). Here, by contrast, there was no physical or even economic injury alleged or found; compensatory damages were merely presumed to flow from the allegedly slanderous statements effect on Mr. Wilson's reputation in the eyes of one person--Dr. Hamsa--and totaled only $4,000.

The Iowa court outright dismissed *BMW's* second guidepost, the ratio of actual harm to punitive damages, 116 S. Ct. at 1601, as being "[o]f minor significance." App. at 32a. To underline its view that this guidepost does not deserve meaningful analysis, the court actually *increased* the punitive damage award approved by the trial court to the exact amount struck down in *BMW*, thereby producing the precise "breathtaking" 500:1 ratio that this Court rejected in *BMW*. The court made no attempt whatsoever to justify such a ratio and, in fact, there is no more justification for such a gross disparity here than there was in *BMW*. IBP could not possibly have had notice that it would be subject to such a penalty on account of the allegedly false statements of one nurse to one doctor concerning a single employee.

Arndt); in fact, Beam was a high school graduate with no medical training and no background in nursing. (*See* Tr. 61-63)

Nor did the Iowa court even mention--either in its cursory discussion of *BMW* or in its equally cursory discussion of the appropriate amount of punitive damages--the third *BMW* guidepost: comparison to legislatively established penalties. 116 S. Ct at 1603. That guidepost confirms that $2 million violates due process. After proof of liability beyond a reasonable doubt--a procedural protection that IBP did not have in this proceeding--the highest fine that could have been imposed would have been $1,500. *See* Iowa Code § 903.1(b). The corporation also would have been subject to paying the victim three times the victim's loss--here an additional penalty of $8,000 (in addition to the $4,000 of compensatory damages already levied)--and a criminal surcharge of 30 percent of the fine--an additional $450. *See* Iowa Code § 909.4; Iowa Code § 911.2. Thus, the maximum penalty that could have been imposed for a finding of *criminal* liability--which was not made here--would have been less than $10,000. The $2 million fine levied against IBP here is thus more than 200 times larger than that legislatively established monetary punishment. Such a gross disparity demonstrates that nothing in the enactments of the Iowa Legislature put IBP on notice that it could be subject to a multi-million dollar penalty for the conduct at issue in this case.[5]

The Iowa court not only ignored two of the three *BMW* guideposts for determining fair notice, it then proceeded to justify the multimillion dollar penalty by looking to IBP's financial position and the international scope of its

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5 IBP likewise was not put on notice of a possible multi-million punishment by any conceivably relevant federal enactment. The maximum penalty for making a false entry in OSHA records, assuming for argument's sake that IBP could be punished for such conduct in this case, is $10,000. 29 U.S.C. § 666(g).

operations. App. at 32a-33a. The court stated its view that this Court had "approved" of such analysis, but the Court has done the opposite. In *BMW*, the Court pointedly did *not* include the defendants' financial status as a guidepost, instead announcing that "[t]he fact that [a defendant] is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business." *BMW*, 116 S. Ct. at 1604. And the Iowa Supreme Court's focus on the company's international operations runs counter to *BMW*'s prohibition on extraterritorial punishment. *See id.* at 1595-98.

In short, the decision below committed palpably clear constitutional error under *BMW*, and should be summarily reversed.

2. The Result In This Case Contrasts Sharply With The Results In Cases That Have Faithfully Applied *BMW*

Courts that--unlike the Iowa Supreme Court--have faithfully applied *BMW* have reached results that sharply differ from the $2 million penalty assessed by the Iowa court in this case. For example, *Schimizzi v. Illinois Farmers Insurance Co.* involved insurance bad faith resulting in compensatory damages of $45,000, far greater than the actual damages in this case. The court relied on *BMW* to reduce a $600,000 penalty to $135,000. 928 F. Supp. 760, 787 (N.D. Ind. 1996). Similarly, *Utah Foam Products Co. v. Upjohn Co.* involved fraudulent misrepresentation resulting in about $300,000 in actual damages. The court relied on *BMW* to slash a $5.5 million punitive award to about $600,000. 930 F. Supp. 513, 532 (D. Utah 1996). In discrimination suits, courts have looked to *BMW* for guidance in assessing the excessiveness of punitive damage awards, resulting in sharp reductions. *See*

Iannone v. Frederic R. Harris, Inc., 941 F. Supp. 403, 415 (S.D.N.Y. 1996) (reducing punitive award by 80 percent, from $250,000 to $50,000, where compensatory damages were less than $30,000); *Rush v. Scott Specialty Gases, Inc.*, 930 F. Supp. 194, 201-02 (E.D. Pa. 1996) (reducing punitive award by 90 percent, from $3 million to $300,000, where compensatory damages were $303,000); *see also Geuss v. Pfizer, Inc.*, 1996 WL 729048, at *12 (E.D. Pa. Dec. 17, 1996) (reducing punitive award in Americans with Disabilities Act case by 88.33 percent, from $150,000 to $17,500, where compensatory damages were $165,250). And the Alabama Supreme Court, in its first substantive review of punitive damage awards since being reversed in *BMW*, ordered massive reductions of multimillion dollar punitive damage verdicts for misrepresentation and suppression. *Foremost Ins. Co. v. Parham*, 1997 WL 112722, at *24-*25 (Ala. Mar. 14, 1997) (reducing two awards of $3 million each to $60,500 each and two awards of $4.5 million each to $114,500 and $112,500 respectively). In its reconsideration of the *BMW* case itself, the Alabama court reduced the $2 million punishment to $50,000. *BMW of North America, Inc. v. Gore*, 1997 WL 233910, at *16 (Ala. May 9, 1997).

Of particular note is the emphasis that courts reviewing awards have put on the guidepost that the Iowa court dismissed--the ratio of actual damages for punitive damages in determining excessiveness. *See Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 943 (5th Cir. 1996) (vacating a punitive damage award in part because it was 6.5 times the compensatory award, thereby exceeding the 4:1 ratio that was close to the line) (citing *BMW*, 116 S. Ct. at 1602), *cert. denied*, 117 S. Ct. 767 (1997); *Continental Trend Resources*, 101 F.3d at 642 (ratio between 15:1 and 30:1 is "too large"); *Florez v. Delbovo*, 939 F. Supp. 1341, 1348 (N.D. Ill. 1996) (award of "more than 13 times the actual or potential damages . . . is clearly 'beyond the line'

in terms of constitutional propriety"); *Utah Foam Prods. Co.*, 930 F. Supp. at 532 ("The ratio [of 17.5 to 1] between the amount of actual damages awarded and the amount awarded as punitive damages is grossly excessive.").

As these cases demonstrate, meaningful application of *BMW* could not possibly support the $2 million penalty assessed by the Iowa Supreme Court in this case, where actual damages, which in any event were merely presumed, were only $4,000. Summary reversal is appropriate, because the Iowa Supreme Court has joined a minority of courts that have cited *BMW* without following it. *See Cates Constr., Inc. v. Talbot Partners*, 1997 Cal. App. LEXIS 252 (Cal. Ct. App. March 28, 1997) (approving $15 million punitive damage award for insurance bad faith, where the jury awarded $3.142 million in compensatory damages for breach of contract and $1 stipulated compensatory damages on bad faith claim); *PaineWeber Real Estate Securities, Inc. v. Fireman's Fund Ins. Co.*, No. A063060 (Cal. Ct. App. Jan. 3, 1997) (unpublished) (affirming $25 million punitive damage award, apparently the largest ever affirmed by a California appellate court, in insurance bad faith case with $3 million in compensatory damages); *Walston v. Monumental Life Ins. Co.*, 923 P.2d 456, 468 (Idaho 1996) (affirming $3.2 million punitive damage award in breach of contract, fraud and bad faith case with $120,000 compensatory award for emotional distress and $3,800 for breach of contract).

B. In The Alternative, The Court Should Grant Plenary Review To Decide Whether Due Process Prohibits A Private Party From Pursuing Punitive Damages Where The State Takes A Share Of The Award

The Iowa Supreme Court, relying on Iowa Code § 668A.1(2)(b), specified in its opinion that the State of

Iowa Civil Reparations Trust Fund would receive what remained of the punitive damage award after the subtraction of applicable fees and costs, including reasonable attorney fees, and a 25 percent cut for Mr. Wilson himself. App. at 33a-34a.[6] Because the statute provides that 25 percent is the maximum portion of the award that could be paid to the plaintiff, the State in essence pays the attorney' contingency fee out of its share. Indeed, Mr. Wilson's counsel, in his rebuttal closing argument, informed the jury--over IBP's objection--that the State would receive 75 percent of any punitive damage award. (Tr. 336) A number of other States have established schemes similar to Iowa's in which the State takes a portion of punitive awards. *See, e.g.*, Ga. Code Ann. § 51-12-5.1(e)(2); Mo. Rev. Stat. § 537.675; Or. Rev. Stat. § 18.540; Utah Code Ann. § 78-18-1(3). The Court should grant plenary review and decide whether

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6 The payment of a substantial portion of the punitive damage award to the State also makes the award subject to the limitations of the Excessive Fines Clause of the Eighth Amendment. This Court, in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 264 (1989), concluded that the Excessive Fines Clause was intended by the Framers of the Constitution to apply where the government either "has prosecuted the action [or] has . . . a right to receive a share of the damages awarded." Although the Court left the "question open," *id.* at 276 n.21, it strongly suggested that where, as here, a share of a punitive damage award is allocated to the State, the Excessive Fines Clause is applicable. *See, e.g., id.* at 272 (suggesting that if government was entitled to "a share in the recovery," Excessive Fines Clause would apply); *id.* at 275 (suggesting Clause would apply if State "used the civil courts to extract large payments or forfeitures for the purpose of raising revenue or disabling some individual"); *id.* at 298-99 (O'Connor, J., concurring in part and dissenting in part) ("[T]he Court suggests . . . that the Excessive Fines Clause will place some limits on awards of punitive damages that are recovered by a governmental entity.").

such systems, which were unknown to common law and are of very recent origin, violate the Due Process Clause.

Punishments in our system of government are customarily sought by public officials, constrained by standards of accountability imposed on public prosecutors, who are precluded by law from having any personal stake in the outcome of the prosecution. Although early in our Nation's history, the States followed the English system of permitting private prosecutors in criminal cases, since the beginning of the 19th century, most States have been "firmly committed to the concept of official public prosecution." Note, *The Outmoded Concept of Private Prosecution*, 25 Am. U.L. Rev. 754, 763 (1976); *cf. Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 783, 808 & n.10 (1987) (noting that most States have acknowledged the principle of a disinterested prosecutor). And in those few States that permit private prosecution of certain criminal offenses, restrictions are imposed that guarantee the due process safeguard of a disinterested prosecutor under the control of the executive.[7]

The punitive damage system, on the other hand, is driven by private litigants and their lawyers, who have a private interest in the outcome of the litigation and are unfettered by executive duties and responsibilities or by the accountability imposed by the democratic process. Indeed,

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[7] In these States, the private prosecutor is under the control of the district attorney's office and may participate in criminal proceedings only with that officer's permission. Note, *Private Prosecutors In Criminal Contempt Actions Under Rule 42(b) of the Federal Rules of Criminal Procedure*, 54 Fordham L. Rev. 1141, 1153 & n.51 (1986). In addition, private prosecutors are forbidden from representing a plaintiff in civil litigation related to the criminal prosecution. *Id.* at 1154 & n.54.

plaintiffs' lawyers are bound to serve their private clients, not the public, and usually have a direct, material and purely personal interest in inflicting the greatest possible punishment in every case. "A person who is to profit by the punishment of another is likely to prefer severe punishment to admonition which will best serve social ends, and the two are not necessarily synonymous." Clarence Morris, *Punitive Damages in Tort Cases,* 44 Harv. L. Rev. 1173, 1178 (1931).

A system such as Iowa's, where the plaintiffs' counsel literally cloaks himself in the guise of a private attorney general by pointing to the State's share in the bounty he hopes to exact from the defendant, presents the most unfair system of private prosecution of public offenses. "A scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249-50 (1980). Moreover, under the Iowa scheme, the State is basically a contingency fee client of the plaintiff's attorney. The State thereby can reap the benefits of the excesses of private prosecutors without incurring any of the burdens of adhering to the responsibilities and protections that ordinarily restrict the State's power to inflict and collect punitive fines. Indeed, the dangers of abuse are most acute under the very circumstances presented here, where the arm of the State that receives the payment is the judiciary, *see* Iowa Code § 668A.1(2)(b), and it is the judiciary that provides the only conceivable check on the private prosecutor.

This Court previously has warned that the consequences attendant on the wielding of prosecutorial power require an "assurance that those who would wield this power will be

guided solely by their sense of public responsibility for the attainment of justice." *Young*, 481 U.S. at 814. The result in this case underscores the validity of that warning. The Court now should take the next step and hold that "the practice--federal or state--of appointing an interested party's counsel to prosecute" defendants on behalf of the State "is a violation of due process." *Id.* at 814-15 (Blackmun, J., concurring). This Court therefore should grant plenary review and hold that where the State shares in a punitive damage award, due process "requires a disinterested prosecutor with the unique responsibility to serve the public, rather than a private client, and to seek justice that is unfettered." *Id.*

CONCLUSION

The petition for a writ of certiorari should be granted and the case either summarily reversed in light of *BMW* or set for plenary consideration.

May 14, 1997

Respectfully submitted,

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IN THE SUPREME COURT OF IOWA

No. 258/95-477

Filed December 18, 1996

KEVIN WILSON,

Appellant,

vs.

IBP, INC., and DIANE ARNDT,

Appellees.

Appeal from the Iowa District Court for Pottawattamie County, James R. Richardson, Judge.

Appeal and cross-appeal from trial court's granting a new trial conditioned on plaintiff's rejection of remittitur of punitive damage award. AFFIRMED AS MODIFIED ON APPEAL AND REMANDED; AFFIRMED ON CROSS-APPEAL.

David L. Brown of Hansen, McClintock & Riley, Des Moines, and Randall J. Shanks and Laura L. Pattermann, Council Bluffs, for appellant.

Mark McCormick and Margaret C. Callahan of Belin Harris Lamson McCormick, A P.C., Des Moines, for appellant.

Considered en banc.

SNELL, Justice.

This appeal arises from an order of the district court requiring remittitur of all but $100,000 of a $15 million punitive damage award, or in the alternative, granting a new trial on the issue of punitive damages. Plaintiff-appellant, Kevin Wilson, rejected the remittitur conditions and appealed. Defendants-appellees, IBP, Inc. and Diane Arndt, cross-appealed. We affirm as modified on appeal and remand for entry of judgment or for a new trial; we affirm on the cross-appeal.

I. Background Facts and Procedure

Plaintiff Kevin Wilson injured his back while working for defendant IBP, which is self-insured for purposes of workers' compensation. Defendant Diane Arndt is a registered nurse who was employed by IBP as manager of occupational health services for its Council Bluffs plant. In this capacity, it was Arndt's job to coordinate workers' medical care, treatment, and recovery, including overseeing work restrictions, monitoring their condition, setting up doctor's appointments, and overseeing the OSHA logs. It was Arndt who set up Wilson's appointments for treatment after his injury.

As part of its policy of seeking "conservative" treatment for injured employees, IBP sent Wilson to Dr. A.K. Argawal, who initially told Wilson to treat the injury only with rest. Eventually, Dr. Argawal assigned Wilson to light duty at the plant. Wilson, however, chose not to accept the light duty assignment and asked for a second medical opinion on his condition because he felt the treatment provided by Dr. Argawal was too conservative and ineffective. Arndt authorized a second opinion with Dr. William Hamsa, who diagnosed Wilson with an unstable disc and prescribed bed rest for him. Around the same time, IBP's corporate security department instituted a surveillance operation directed at Wilson. According to

IBP, these procedures are common to ensure that workers are legitimately injured and are following their recovery instructions. The investigation involved observing Wilson's activity at home and following him in an unmarked van. Security reported to Arndt that Wilson continued to drive his children and run errands from time to time when he was instructed to be in bed.

Based on this report from corporate security, Arndt sought to have Dr. Hamsa return Wilson to light duty because of what she believed was Wilson's failure to follow the prescribed lifestyle restrictions. Arndt also informed Dr. Hamsa that IBP had a videotape showing that Wilson was not following his prescribed treatment regimen. This statement, however, was false as Arndt knew no such videotape actually existed. After this conversation with Arndt, Dr. Hamsa met with Wilson and sought to return him to light duty. Dr. Hamsa then told Wilson that he was aware Wilson had been "messing around" and was not following his prescribed treatment. Wilson testified that Dr. Hamsa accused him of lying and Dr. Hamsa subsequently discontinued his treatment. Wilson then requested that IBP refer him to a neurological surgeon who, after examination, took Wilson off light duty and performed surgery to correct his condition. Wilson never returned to work at IBP and eventually settled his workers' compensation claim against the company.

After the workers' compensation claim was settled, Wilson brought an action in district court alleging Arndt, in her statements to Dr. Hamsa regarding the non-existent videotape, slandered him and that she had violated the fiduciary duty imposed on her as an occupational health nurse at IBP. Wilson also named IBP as a defendant in the action, asserting that IBP was liable for the actions of Arndt.

The jury returned a general verdict in Wilson's favor and awarded him $4000 in compensatory and $15 million in punitive damages. After the verdict was returned, the defendants filed a motion for judgment notwithstanding the verdict (JNOV), an alternative motion for remittitur, and an alternative motion for a new trial. The court ordered a remittitur of the amount of the punitive damage award in excess of $100,000 and a new trial conditioned upon rejection of the remittitur conditions. After Wilson failed to accept the conditions of the remittitur, plaintiff and defendants moved for clarification of the new trial order. This district court entered a ruling dated March 23, 1995 specifying the grounds for the new trial:

> (a) The punitive damages issue would be retried against both defendants.
>
> (b) A new determination would be made by the jury as to whether Arndt's conduct met the standard of willful and wanton disregard for the rights and safety of another as provided in Iowa Code section 668A.1(1)(a).
>
> (c) The jury would be asked to determine anew if IBP is liable for punitive damages on the ground of complicity under the standard set forth in *Briner v. Hyslop*, 337 N.W.2d 858, 861-67 (Iowa 1983).
>
> (d) The jury would be asked to determine anew whether the conduct of Arndt was directed specifically at plaintiff under the standard in Iowa Code section 668A.1(1)(b).
>
> (e) The jury would not be instructed that the maximum punitive damage award against

IBP, if any, could not exceed $100,000 (the amount set by the trial court in remittitur).

It is from these court orders that plaintiff appeals and defendants cross-appeal.

II. Issues on Appeal

Plaintiff claims the trial court abused its discretion in ordering a new trial based on excessive punitive damages. The trial court reasoned that the $15 million punitive damages verdict was so large and disproportionate to the plaintiff's actual damages that it was grossly excessive and likely the result of passion or prejudice on the part of the jury. Plaintiff claims further error in the court's ordering a remittitur of all punitive damages assessed that exceed $100,000.

Defendants, as cross-appellants, claim error in not finding exclusive jurisdiction in the Iowa Industrial Commissioner on the issue of fiduciary duty and in submitting it to the jury. Error is also claimed in submitting the issues of defamation, compensatory damages, and punitive damages, in finding the jury verdict unambiguous, and in not granting a new trial on all issues.

III. Breach of Fiduciary Duty

A. Subject Matter Jurisdiction

Defendants challenge the validity of Wilson's claim for breach of fiduciary duty and the resulting jury verdict in Wilson's favor. They contend this claim falls within the exclusive jurisdiction of the industrial commissioner and thus was not properly brought before the district court. We disagree.

Our review of proceedings concerning subject matter jurisdiction is at law. *S.S. v. Iowa Dist. Ct.*, 528 N.W.2d 130, 132 (Iowa 1995); *Tigges v. City of Ames*, 356 N.W.2d 703, 512 (Iowa 1984). Our scope of review is for correction of errors at law. Iowa R. App. P. 4.

An action involving compensation for Wilson's physical injury suffered while employed at IBP was commenced as a workers' compensation proceeding under chapter 85 of the Iowa Code and was settled prior to trial. The issues involved at trial and here on appeal are independent of Wilson's initial physical injury. IBP's status as a self-insured employer for workers' compensation subjects it to liability as an insurer. *Reedy v. White Consol. Indus., Inc.*, 503 N.W.2d 601, 602-03 (Iowa 1993).

The provisions of the workers' compensation act are intended to be "the exclusive and only rights and remedies of [an] employee . . . at common law or otherwise . . . against . . . his or her employer . . . ." Iowa Code § 85.20 (1995). We have previously recognized that where no adequate remedy is provided by the Iowa workers' compensation act, then an injured worker's claim falls outside of the exclusivity provision. *See Boylan v. American Motorists Ins. Co.*, 489 N.W.2d 742, 744 (Iowa 1992)(establishing independent bad faith tort liability for insurers because workers' compensation act does not provide an adequate remedy); *Dolan v. Aid Ins. Co.*, 431 N.W.2d 790, 794 (Iowa 1988)(recognizing first-party bad faith tort claims "to provide the insured an adequate remedy for an insurer's wrongful conduct."); *see also* 1A Larson, *Workmen's Compensation Law* § 48.34(a) (1994). Wilson's claims for breach of fiduciary duty and defamation, as intentional torts, fall outside the scope of the remedies available under the workers' compensation act.

Defendants attempt to frame the intentional tort claims as a general dispute involving Wilson's overall dissatisfaction

with the care he received. The record, however, does not support this construction of Wilson's claim. Although there was some dispute over IBP's habit of practicing "conservative care," the gravamen of Wilson's complaint involves alleged intentional torts committed by Arndt in the period preceding and during his treatment. Thus, this case is not a simple issue of dissatisfaction with care as defendants suggest.

IBP notes it has a right to choose the care it provides (including its aggressiveness) and that injured workers who are dissatisfied with their care have an exclusive remedy with the industrial commissioner pursuant to Iowa Code section 85.27. *See Harned v. Farmland Foods, Inc.*, 331 N.W.2d 98, 99 (Iowa 1983). The district court, however, was correct in distinguishing the facts in *Harned* from the case at bar. We find it significant that the facts in *Harned* "suggest plaintiffs' claim was simply one of failure to provide requested care. There is nothing to indicate an intentional tort." *Id.* at 101. Here, the district court found that Wilson's claims for breach of fiduciary duty and slander are torts independent of chapter 85 and thus do not fall within the exclusive jurisdiction of the industrial commissioner. We agree. Whatever their merit or lack thereof, both of the alleged intentional torts are cognizable, if at all, outside the scope of the workers' compensation act. Thus, the district court properly exercised subject matter jurisdiction over these questions.

B. Sufficiency of the Evidence

Defendants next contend that Wilson failed to create a jury issue on the existence of a fiduciary relationship between himself and defendant Arndt. Accordingly, defendants assert that a JNOV should have been ordered by the court once the jury returned a verdict in Wilson's favor on this issue.

Sufficiency of the evidence is reviewed for correction of error at law. Iowa R. App. P. 4. A motion for JNOV should be denied if there is substantial evidence to support each element of the plaintiff's claims. *Faught v. Budlong*, 540 N.W.2d 33, 35 (Iowa 1995); *Slocum v. Hammond*, 346 N.W.2d 485, 494 (Iowa 1984). Evidence is substantial when a reasonable mind would find the evidence presented adequate to reach the same findings. *Johnson v. Dodgen*, 451 N.W.2d 168, 171 (Iowa 1990); *Grimwell Mut. Reins. Co. v. Voeltz*, 431 N.W.2d 783, 785 (Iowa 1988); *see also Larsen v. United Fed. Sav. & Loan Ass'n*, 300 N.W.2d 281, 283 (Iowa 1981) ("If reasonable minds could differ on the issue it was properly submitted to the jury.").

When considering a motion for judgment notwithstanding the verdict, the district court must view the evidence in the light most favorable to the party against whom the motion is directed. *Watson v. Lewis*, 272 N.W.2d 459, 461 (Iowa 1978). In reviewing the propriety of the district court's ruling on such a motion, we view the evidence in the same manner. Accordingly, we must determine whether there is sufficient evidence to generate a jury question. *Id.* at 463. As we have previously noted,

> [I]f there is substantial evidence to support the claim or defense, the motion for directed verdict or for judgment notwithstanding the verdict should be denied. Conversely, without such evidence, a directed verdict or judgment notwithstanding the verdict is appropriate.

Valadez v. City of Des Moines, 324 N.W.2d 475, 477-78 (Iowa 1982).

In considering defendants' claims regarding the sufficiency of the evidence to generate a jury question, we

must examine the nature of a fiduciary or confidential relationship. We have defined a fiduciary relationship in the following manner: "A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relationship." *Kurth v. Van Horn*, 380 N.W.2d 693, 695 (Iowa 1986) (citing Restatement (Second) of Torts § 874 cmt. a (1979)). We have also noted that

> a confidential relationship "exists when one person has gained the confidence of another and purports to act or advise with the other's interest in mind. . . . The gist of the doctrine of confidential relationship is the presence of a dominant influence under which the act is presumed to have been done. [The] [p]urpose of the doctrine is to defeat and protect betrayals of trust and abuses of confidence."

Hoffman v. National Med. Enters., Inc., 442 N.W.2d 123, 125 (Iowa 1989) (quoting *Oehler v. Hoffman*, 253 Iowa 631, 635, 113 N.W.2d 254, 256 (1962)).

Defendants suggest that the critical factor in determining the existence of a fiduciary relationship is domination and control. Although domination and control are significant factors, neither are determinative by themselves. Rather, we are cognizant of the fact that "[b]ecause the circumstances giving rise to a fiduciary duty are so diverse, any such relationship must be evaluated on the facts and circumstances of each individual case." *Kurth*, 380 N.W.2d at 696.

The record indicated that Arndt was responsible for directing and managing Wilson's medical care, including scheduling medical appointments and suggesting courses of

treatment. Arndt also contacted Wilson's doctor to request that he be assigned light duty and instructed Wilson that he was required to seek care from IBP's doctors and could not choose his own physician. The resulting relationship between Arndt and Wilson could reasonably be interpreted as involving a degree of domination, even though Wilson also had the freedom to seek alternative treatments.

Significantly, Arndt testified that her first loyalty was to Wilson as an employee of IBP, and not to IBP as a company. This suggests that there was a certain amount of trust that created a confidential relationship. This is the type of relationship contemplated in *Hoffman*. Employees at IBP placed confidence in Arndt to provide for treatment of their injuries. Evidence that Arndt was dishonest in her dealings with IBP employees could reasonably constitute a "betrayal of trust and abuse of confidence." In viewing the evidence in the light most favorable to the verdict, we find that there was sufficient evidence to generate a jury question on this issue and to support the verdict in Wilson's favor.

IV. Defamation/Slander

A. Sufficiency of the Evidence

Wilson's second intentional tort claim alleges that Arndt's statement to Dr. Hamsa regarding Wilson's alleged failure to follow Dr. Hamsa's advice and the non-existent videotape were defamatory because they injured his reputation and character, particularly in the eyes of Dr. Hamsa. The jury found for Wilson and awarded damages. Defendants contend the district court erred by not ordering a JNOV on Wilson's claim of defamation. We disagree.

As we have noted, "[t]he gist of an action for libel or slander is the publication of written or oral statements

which tend to injure a person's reputation and good name. . . . Slander generally consists of the oral publication of defamatory matter." *Lara v. Thomas*, 512 N.W.2d 777, 785 (Iowa 1994). Certain statements can be characterized as slander per se. "Words are libelous per se if they are of such a nature, whether true or not, that the court can presume as a matter of law that their publication will have a libelous effect." *Vinson v. Linn-Mar Community Sch. Dist.*, 360 N.W.2d 108, 116 (Iowa 1984) (citing *Haas v. Evening Democrat Co.*, 252 Iowa 517, 522, 107 N.W.2d 444, 447 (1961)). Thus, statements categorized as slander per se are actionable without proof of malice, falsity, or special harm. *Spencer v. Spencer*, 479 N.W.2d 293, 296 (Iowa 1991); *Vinson*, 360 N.W.2d at 115-16. In addition, we have recognized that "[s]landerous imputations affecting a person in his or her business, trade, profession, or office are also actionable without proof of actual harm." *Lara*, 512 N.W.2d at 785.

Here, the district court did not determine whether Arndt's statements were slander per se, but instead left it to the jury to consider the nature of Arndt's communication with Dr. Hamsa. In assessing whether the slander issue should have been submitted to the jury, we need only decide whether the statement could be understood as slanderous per se. *See Vinson*, 360 N.W.2d at 116 ("Because defendants assert the slander claim should not have been submitted at all, we need decide only whether the statement could reasonably be understood as slanderous per se.").

We find that a reasonable juror could interpret Arndt's statements as constituting slander per se. Iowa law is clear that "[a]n attack on the integrity and moral character of a party is libelous per se." *Id.*; *see also Shaw Cleaners & Dryers, Inc. v. Des Moines Dress Club*, 215 Iowa 1130, 1137, 245 N.W. 231, 234 (1932). Arndt's statements to Dr. Hamsa regarding Wilson's alleged untruthfulness about

his condition and the non-existent videotape could be reasonably understood as imputing dishonesty to Wilson and as an attack on his integrity and moral character. Thus, under the standards of review enunciated above, this issue was properly submitted to the jury to determine whether Arndt's statements constituted slander per se. Furthermore, sufficient evidence also exists to support the jury's finding that Arndt's statements were defamatory.

B. Substantial Evidence of Damages

Defendants further argue that Wilson failed to present substantial evidence of damages from Arndt's alleged slanderous communication to Dr. Hamsa. Slander per se, however, is actionable without proof of damage. *Lara*, 512 N.W.2d at 786; *Rees v. O'Malley*, 461 N.W.2d 833, 839 (Iowa 1990); *Vinson*, 360 N.W.2d at 115-16. Recovery is limited to "those damages which were a natural and probable consequence of the original slander or its repetition or republication." *Lawrence v. Grinde*, 534 N.W.2d 414, 418 (Iowa 1972)); *see also Rees*, 461 N.W.2d at 839. There is no indication in the record that the jury awarded ordinary damages above and beyond that permitted by this standard.

Wilson's testimony sufficiently met the requirement that the jury "be presented with evidence upon which the consequences of the [slander] can be judged, evidence such as the nature of the plaintiff's reputation before the libel was published and the extent of the publication." *Rees*, 461 N.W.2d at 839 (citing *Kelly v. Iowa State Educ. Ass'n*, 372 N.W.2d 288, 300 (Iowa App. 1985)). Wilson testified that as a result of this incident, he was unable to return to work because of lack of self-esteem and distrust of his employer, and that he suffered damage to his reputation as a result of Arndt's statements. He particularly emphasized the

detrimental effect the communication had on his relationship with Dr. Hamsa, who accused Wilson of lying.

Defendants' contention that Wilson's reputation before the slanderous communication was less than exemplary and that the scope of the publication was limited does not necessarily preclude a recovery. As we stated in *Rees*, "[r]equring evidence of reputation and extent of publication is necessary so that a jury can determine the extent of injury, but is not imposing a burden on the plaintiff of providing damages." *Id.* Thus, evidence of Wilson's prior reputation is only useful in determining the amount of damages awarded, not whether they should be awarded at all as a matter of law.

After considering the evidence, the jury returned a general verdict in the amount of $4000 in compensatory damages for Wilson. The district court, in considering defendants' motion for JNOV, noted that at the very least Wilson's reputation and relationship with Dr. Hamsa were disrupted by Arndt's statements. We agree with the district court that, in viewing the record in the light most favorable to the verdict, sufficient evidence exists to support submission of the damage claim and the jury's verdict.

C. Substantial Truth

In further defense to the defamation claim, defendants contend that Arndt's statements to Dr. Hamsa were substantially true and thus establish a complete defense to the claim. Defendants suggest that because Wilson allegedly did not follow his prescribed bed rest and that he continued to run errands and work on his car against Dr. Hamsa's orders, then Arndt's statements that Wilson was not injured as severely as he claimed and that he was not following Dr. Hamsa's orders were substantially true. But whether Wilson actually followed the exact requirements prescribed by his doctor does not affect the underlying

claim. In recognizing substantial truth as a defense to a defamation action, we emphasized:

> It is no longer necessary for a libel defendant to establish the literal truth of the publication in every detail as long as the "sting" or "gist" of the defamatory charge is substantially true.
>
> The gist or sting of the defamatory charge . . . is "the heart of the matter in question-the hurtfulness of the utterance."

Behr v. Meredith Corp., 414 N.W.2d 339, 342 (Iowa 1987)(quoting *Vachet v. Central Newspapers, Inc.*, 816 F.2d 313, 316 (7th Cir. 1987)). Thus, the literal scope of Wilson's activity is not determinative of this issue.

We agree with the trial court in that the essence of the alleged defamatory statement was that Wilson was faking the severity of his injury and was being untruthful to his doctor, *i.e.*, that he was a liar. It was not, as defendants suggest, that he was working on his car or driving his children to school. When considering the evidence in the light most favorable to the verdict, we find that there was sufficient evidence to both submit this question to the jury and to support the jury's verdict that substantial evidence of damages was present.

V. Punitive Damages

Plaintiff, as appellant, and defendants, as cross-appellants, all complain about the handling and result of the trial court's rulings on the issue of punitive damages. The jury awarded a $15 million judgment against IBP. On posttrial motions by defendants the court reduced this amount, ordering a remittitur to $100,000. On refusal of

the plaintiff to accept the remittitur conditions, the district court ordered a new trial to determine the amount of punitive damages, if any, that should be assessed against either or both defendants.

A. Ambiguity of Punitive Damage Award

Defendants argue that the punitive damage award is fatally ambiguous and thus void because the jury did not identify against whom the punitive damages were awarded. We find this argument to be without merit. The district court also held that this issue goes to the form of the punitive damage jury instruction, was not timely raised by an objection, and was therefore waived. Defendants object to the court's characterization of the issue and assert the error was preserved because it concerns interpretation of the jury's verdict. Because we find the solution to this issue substantively rather than in procedural forays, we assume defendants are correct and that error is preserved.

The trial court, in Instruction No. 24, set out the law pertaining to IBP's liability for punitive damages:

1. IBP, Inc. authorized the act and the way it was done; or

2. Diane Arndt was unfit and IBP, Inc. was reckless in employing or retaining her; or

3. Diane Arndt was employed in a managerial capacity and was acting in the scope of employment; or

4. IBP, Inc. ratified or approved the act.

After receiving this and other instructions, the jury returned a verdict in Wilson's favor, along with answers to special interrogatories, that indicated punitive damages were warranted and that IBP was to be held liable for them. The verdict read as follows:

> We, the Jury, find in favor of the Plaintiff, Kevin Wilson and fix the amount of his recovery against the Defendants at $4,000.00 for compensatory damages.
>
> . . . .
>
> Special Interrogatories - Punitive Damages
>
> Question No. 1: Do you find by a preponderance of clear, convincing and satisfactory evidence the conduct of the defendant, Diane Arndt constituted a willful and wanton disregard for the rights or safety of another?
>
> Answer "Yes" or "No"
>
> ANSWER Yes
>
> . . . .
>
> Question No. 2: What amount of punitive damages, if any, do you award?
>
> ANSWER $15,000,000.00
>
> . . . .
>
> Question No. 3: Was the conduct of the defendant, Diane Arndt directed specifically at Kevin Wilson?

Answer "Yes" or "No"

ANSWER No

Question No. 4: Is IBP, Inc., as the employer of Diane Arndt, liable for punitive damages as explained to you in instruction number _____?

Answer "Yes" or "No"

ANSWER Yes

We have said "[i]t is fundamental that a jury's verdicts are to be liberally construed to give effect to the intention of the jury and to harmonize the verdicts if it is possible to do so." *Hoffman*, 442 N.W.2d at 126. Only where the verdicts are so logically and legally inconsistent that they cannot be reconciled will they be set aside. *Id.* at 127. Reading the instructions as a whole (as the court instructed the jury to do), and in connection with the jury's answers on the special interrogatory verdict forms, leads to the conclusion that IBP was to be solely liable for any punitive damages awarded based on the conduct of defendant Arndt. As support for this determination, no specific punitive damage award was directed against Arndt. The trial court did not err in finding there was no ambiguity and that the punitive damage award was against IBP alone.

B. Sufficiency of the Evidence

On cross-appeal, defendants claim that insufficient evidence was presented to support the submission of Wilson's punitive damage claim. The evidence to support an award must be clear, convincing and satisfactory. *See* Iowa Code § 668A.1(1)(a). The specific conduct that will support an award of punitive damages is that which

establishes a "willful and wanton disregard for the rights or safety of another." *Id.* Only evidence that is relevant to the underlying wrong for which liability is imposed can support an award of punitive damages. *Burke v. Deere & Co.*, 6 F.3d 497, 511 (8th Cir. 1993).

In reviewing the evidence to determine if defendants' motion for a directed verdict on the issue of sufficiency of the evidence should have been sustained, we view the evidence in the light most favorable to the party resisting the motion, *i.e.*, plaintiff Wilson. Iowa R. App. P. 14(f)(2); *Hockenberg Equip. Co. v. Hockenberg's Equip. & Supply Co.*, 510 N.W.2d 153, 156 (Iowa 1993).

The trial court gave Instruction No. 22 on the general law of punitive damages:

> Punitive damages may be awarded if the plaintiff has proven by a preponderance of clear, convincing and satisfactory evidence that Diane Arndt's conduct constituted a willful and wanton disregard for the rights or safety of another and caused actual damage to the plaintiff.
>
> Punitive damages are not intended to compensate for injury but are allowed to punish and discourage the defendant and others from like conduct in the future.
>
> There is no exact rule to determine the amount of punitive damages, if any, you should award. In fixing the amount of punitive damages, you may consider all the evidence including:
>
> 1. The nature of the defendant, Diane Arndt's conduct.

2. The amount of punitive damages which will punish and discourage like conduct by the defendants in view of their financial condition.

3. The plaintiff's actual damages.

Instruction No. 9 instructed the jury that:

> conduct is willful and wanton when a person intentionally does an act of an unreasonable character in disregard of a known or obvious risk that is so great as to make it highly probably that harm will follow.

The evidence showed that Wilson was diagnosed at his first visit to Dr. Hamsa, an orthopedic doctor, as having an unstable disc in his spine. Diane Arndt knew of the injury and admitted that it was legitimate. She also acknowledged that Wilson was experiencing pain, but later told other nurses that he was exaggerating and that as a nurse, she could tell there was nothing wrong with him. When she heard that Dr. Hamsa had ordered Wilson to take at least two weeks off work her response was, "We'll see about that."

Dr. Hamsa conferred with Arndt after an examination on April 26, 1991, and said that he would refer Wilson to a neurosurgeon if Wilson's condition did not improve in three weeks. Less than two weeks after learning of the possible recommendation for surgery, Arndt telephone Dr. Hamsa to tell him that IBP had videotaped Wilson "working on his car and out doing other activities without any apparent distress." No such videotape existed and Arndt knew this was a lie. The plant's workers' compensation coordinator, Karen Beam, testified that Arndt told Dr. Hamsa the story about the videotape in order to

prejudice him against Wilson. In fact, Arndt felt her call "assisted" in the doctor's decision to return Wilson to light duty status.

Other evidence indicated that Arndt had an openly low opinion of workers, referring to them as "idiots" and "jerks." She made remarks to doctors that other injured IBP workers were lying about their injuries. Evidence of this type included her statements that "this guy's full of shit." Though warned by a nurse colleague that interfering with medical treatment "seemed an awful dangerous thing to do," Arndt's response was that she did not think Dr. Hamsa would mention their conversations. Diane Arndt knew that Dr. Hamsa trusted her to provide him with truthful and accurate information yet she admitted making up the story about the videotape. Karen Beam also testified that she was asked by Arndt to make up a story that somehow Kevin Wilson's case got confused with somebody else's case where there was a video of the other person.

Arndt had another reason for responding to worker's injuries as she did. IBP had a financial incentive program, somewhat disingenuously called "the safety award system," whose goal was to keep workers on the job. As part of the safety award system, IBP recorded the number and severity of injuries and the number of work days missed by employees due to work-related injuries. Employees of the division with the lowest injury statistics received gifts or extra year-end bonuses. Through its financial incentives, the safety award system provided strong motivation for management to reduce the number of lost time days.

IBP had a practice of getting injured employees to punch in at work and then sending them home, but allowing the employee's supervisor to record the employee as having worked a full day. Since IBP's policy was not to count these partial days as lost time days, the statistics for that IBP division looked favorable for purposes of the safety

award system. Kevin Wilson was told to come to work to punch in just three days after he ruptured a disc in his spine. Other workers had been told by IBP to report to work the same day they were scheduled for surgery, or the day after having had a finger amputated.

IPB was also required to keep records of lost time days in order to comply with OSHA regulations. As with the safety award system, IBP's practice was not to report partial days as lost time days even when the employee came in just long enough to punch in. IBP's management was aware of, and participated in, this practice. Additionally, IBP had a computer system that determined whether a given injury was recordable under OSHA regulations. With some regularity, the nurses at IBP, including Diane Arndt on many occasions, entered erroneous information into the system to deceive it. As a result, the system would classify what should have been a recordable injury as non-recordable.

Any injury requiring surgery received extra attention from IBP because these injuries were typically expensive and frequently resulted in a worker being assigned a disability rating which can be expensive in and of itself. In exercising its right to choose the treating physician in workers' compensation cases, IBP looked for ultra-conservative physicians--those who disliked surgeries. IBP had referred Kevin Wilson to two ultra-conservative doctors, as well as a third doctor who said there was nothing wrong with Kevin before he saw a doctor who recommended surgery. IBP's referral to the last physician, came only after IBP became aware that Wilson had contacted an attorney concerning his treatment by IBP.

From the evidence in this record, a reasonable juror could have found the following: Diane Arndt lied to Dr. Hamsa to keep him from referring Wilson to a neurosurgeon, that IBP and Arndt would profit financially

by getting workers back to work quickly (via IBP's safety award system), and that Arndt maliciously manipulated Wilson's medical treatment for personal profit, knowing that he had an unstable disc in his back. A reasonable juror could conclude from this evidence that Arndt's conduct constituted a willful and wanton disregard of the rights and safety of Wilson.

A reasonable juror could also have found as follows: IBP actively sought ultra-conservative physicians to avoid surgery costs; it hired a staff of investigators to spy on injured employees, one of whom looked into Wilson's apartment windows; workers who were uncooperative in the company's planned medical treatment were assigned by Arndt to a light duty job, watching gauges in the rendering plant, where they were subjected to an atrocious smell while hog remains are boiled down into fertilizers and blood was drained into tanks.

This climate of suspicion toward the legitimacy of injuries to workers and their treatment, well known to Arndt, could be found by a reasonable juror to corroborate a finding of willful and wanton disregard for the rights and safety of Wilson. We find the evidence sufficient under the judicial standard required to submit this issue.

C. Amount of Punitive Damage Award and New Trial Order

Both parties raise issues stemming from the trial court's order granting a new trial. Plaintiff argues for a reinstatement of the jury verdict or a remittitur that properly reflects IBP's degree of culpability. Defendants ask for a judgment notwithstanding the verdict of punitive damages, a new trial on all issues, or an affirmance of the trial court's order granting a new trial on punitive damage claims. Our resolution in this division will answer these questions.

1. Scope of Review

The new trial ordered by the trial court in the instant case was based on the court's inherent power to grant a new trial where the verdict fails to administer substantial justice between the parties. *In Lehigh Clay Products v. Iowa Department of Transportation,* 512 N.W.2d 541, 543-44 (Iowa 1994), we said:

> Iowa has long recognized the trial court's inherent power to grant a new trial where the verdict fails to administer substantial justice. The trial court is not limited to the grounds for granting a new trial specified in Iowa Rule of Civil Procedure 244.

Our scope of review of this issue is for correction of errors of law. Iowa R. App. P. 4. Although the trial court has discretion in ruling on a motion for new trial, that discretion is not unlimited. *Ladeburg v. Ray*, 508 N.W.2d 694, 696 (Iowa 1993). On appeal, we review this issue on the standard of abuse of discretion. Iowa R. App. P. 14(f)(3).

The trial court's discretion can be exercised only for sound judicial reasons. *Jacobsen v. Gamber*, 249 Iowa 99, 102, 86 N.W.2d 147, 149 (1957); *Ferguson-Diehl Constr. Co. v. Langloss,* 239 Iowa 346, 355, 30 N.W.2d 320, 324 (1948). It must not be exercised arbitrarily. *Riley v. Wilson Concrete Co.,* 184 N.W.2d 689, 690 (Iowa 1971). For a trial court to grant a new trial in the interest of justice, it must have some support in the record for doing so. *Kaiser v. Stathas*, 263 N.W.2d 522, 525 (Iowa 1978). Courts have no right to set aside a jury verdict through mere caprice or whim, or to reweigh the evidence submitted, or to sit in judgment on the credibility of witnesses. *Ferguson-Diehl*, 239 Iowa at 355, 30 N.W.2d

at 324. We are obligated to view the evidence in the light most favorable to the jury verdict. *Hall v. Montgomery Ward & Co.*, 252 N.W.2d 421, 422 (Iowa 1977).

2. Development of United States Supreme Court Decisions

Although neither party mounts a constitutional challenge to the award, we are now obligated as a matter of constitutional law to assume the responsibility for reviewing the appropriateness of the size of punitive damage awards. *Ezzone v. Riccardi,* 525 N.W.2d 388, 398-99 (Iowa 1994). Citing *Honda Motor Co.*, we took as a directive in *Ezzone* to order a remittitur if appropriate. *Id.* at 399 (citing *Honda Motor Co. v. Oberg,* 512 U.S. 415, ___, 114 S. Ct. 2331, 2338-41, 129 L. Ed. 2d 336, 346-51 (1994)); *see also Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors, Inc.*, 99 F.3d 587, 593 (4th Cir. 1996).

In recent years the United States Supreme Court has decided several cases giving guidance to the courts on punitive damage issues. In *Pacific Mutual Life Insurance Co. v. Haslip,* 499 U.S. 1, 111 S. Ct. 1032, 107 L. Ed. 2d 731 (1991), insureds brought an action against a life insurance company and its agent for fraud. The Supreme Court affirmed a judgment against the agent and company for $200,000 in compensatory and over $840,000 in punitive damages. The Court held that imposing liability on the insurer based on the doctrine of respondeat superior did not violate the insurer's due process rights under the Fourteenth Amendment to the United States Constitution. The Court noted that punitive damages have long been a part of traditional state tort law. Blackstone noted their use in 3W. Blackstone, Commentaries 137-138. *See also Wilkes v. Wood,* Lofft 1, 98 Eng. Rep. 489 (C.P. 1763)

(the Lord Chief Justice validating exemplary damages as compensation, punishment and deterrence).

In determining that the common law method of assessing punitive damages met constitutional muster, the Court said: "If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it." *Haslip*, 499 U.S. at 19, 111 S. Ct at 1043, 107 L. Ed. 2d at __. Nevertheless, the Court warned that unlimited jury or judicial discretion in fixing punitive damages "may invite extreme results that jar one's constitutional sensibilities." *Id.* No mathematical bright line can be drawn between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. *Id.* General concerns of reasonableness and adequate guidance from the court when a case is tried to a jury, however, do enter into the constitutional calculus. *Id.* A jury "must take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong." *Id.* at 19, 111 S. Ct. at 1044, 107 L. Ed. 2d at ___. As long as the discretion is exercised within reasonable constraints, due process is satisfied. *Id.*

Answering the charge that too little structure is given by a trial court to a jury in these general maxims, the Supreme Court said:

> The discretion allowed under Alabama law in determining punitive damages is no greater than that preserved in many familiar areas of law as for example, deciding "best interests of the child," or "reasonable care," or "due diligence," or appropriate compensation for pain and suffering or mental anguish.

Id.

The Supreme Court also requires additional checks by an appellate court. *Id.* These were satisfied by the Alabama Supreme Court that undertook comparative analysis, applied detailed substantive standards and ensured that the award does not exceed an amount that will accomplish society's goal of punishment and deterrence. *Id.* Constitutional impropriety was held not to have been crossed in *Haslip*, though the punitive award was four times the amount of compensatory damages, 200 times more than the insured's out-of-pocket expenses, and much in excess of any fine for insurance fraud that could be imposed.

A $19,000 actual damage and $10 million punitive award was affirmed by the Supreme Court in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 113 S. Ct. 2711, 125 L. Ed. 2d 366 (1993). The lawsuit was based on a common law action for slander of title. Quoting the *Haslip* guides, the Court concluded that the punitive damage award was not so grossly excessive as to be beyond the power of West Virginia and was consistent with the Due Process Clause. *Id.* at 462, 113 S. Ct. at 2722, 125 L. Ed. 2d at ___. On the disparity between the actual and punitive damages, the Court observed that both state supreme courts and the United States Supreme Court have eschewed an approach that concentrates entirely on the relationship between them. *Id.* at 460, 113 S. Ct. at 2721, 125 L. Ed. 2d at ___. The Supreme Court also observed that in calculating punitive damages it is appropriate to consider "whether there is a reasonable relationship between the punitive damages award and the harm likely to result from defendant's conduct as well as the harm that actually has occurred." *Id.* at ___, 113 S. Ct. at 2721, 125 L. Ed. 2d at ___. *See also BMW of North America, Inc. v. Gore*, ___ U.S. __, __, 116 S. Ct. 1589, __, 134 L. Ed. 2d 809, __ (1996).

Reiterating that meaningful judicial review of punitive damage awards is required by the Due Process Clause, the Supreme Court reversed an award as unconstitutionally obtained in *Honda Motor Co. v. Oberg*, 512 U.S. 415, 114 S. Ct. 2331, 129 L. Ed. 2d 336 (1994). There, the Court held an amendment to the Oregon constitution that limited judicial review violated the Due Process Clause of the Fourteenth Amendment. *Honda Motor Co.*, 512 U.S. at ___, 114 S. Ct. at 2342-43, 129 L. Ed. 2d at __.

In *BMW*, a punitive damage award of $2 million was reversed as violative of the Due Process Clause because of the low level of reprehensibility of conduct and a 500:1 ratio between the award and actual harm done to the purchaser. *BMW*, ___ U.S. at __, 116 S. Ct. at __, 134 L. Ed. 2d at __. The actual harm done arose from the purchase of a new BMW car that had been repainted without the knowledge of the purchaser. The Court noted that none of the aggravating factors associated with particularly reprehensible conduct was present. *Id.* at __, 116 S. Ct. at 1599, 134 L. Ed. 2d at __. The harm done to plaintiff Gore was purely economic in nature. Stressing the degree of reprehensibility the Court said:

> Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct. As the Court stated nearly 150 years ago, exemplary damages imposed on a defendant should reflect "the enormity of the offense."

Id. at __, 116 S. Ct. at 1599, 134 L. Ed. 2d at __. Comparing this ratio of actual damages to punitive damages, the Court found the disparity to be dramatically greater in *BMW* than in the *Haslip* and *TXO* cases. Expanding on this factor, the Court said:

> Indeed, low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.

Id. at ___, 116 S. Ct. at 1602, 134 L. Ed. 2d at __.

In a case decided while *BMW* was pending, the Eighth Circuit found that a 250,000:1 ratio between punitive and actual damages was excessive and violative of due process. *Pulla v. Amoco Oil Co.*, 72 F.3d 648 (8th Cir. 1995). The case involved Amoco's intrusion on the privacy of its employees by accessing their credit card records to check on use of sick leave. The $500,000 punitive damage award was reversed, the court viewing the event as a one-time occurrence that justified a limited award of punitive damages. The touchstone, the court emphasized, is the potential harm that would have likely resulted from the dangerousness inherent in defendant's actual conduct. *Id.* at 659.

A federal district court has since followed the rationale of BMW in *Schmizzi v. Illinois Farmers Insurance Co.*, 928 F. Supp. 760 (N.D. Ind. 1996). It found a punitive award of $600,000 was excessive where the actual damages were $45,000 and that Farmer's conduct did not rank high on the reprehensibility scale. Even so, the court found that the jury intended to award a significant amount in punitive damages, and fixed punitive damages at $135,000.

Recently, the United States Court of Appeals, Fourth Circuit, commented on the relationship between the jury's verdict and the trial court's judgment in assessing punitive

damages. *See Atlas Food Sys. & Servs., Inc.*, 99 F.3d at 595. In the first trial, the jury's award of $3 million punitive damages was reduced by the trial judge to $1 million by a remittitur order or a new trial would be granted. *Id.* at 591. On rejection by the plaintiff, a second trial was ordered which resulted in a jury verdict of $4 million in punitive damages, which was again reduced by the trial judge who entered a remittitur order setting the punitive damages award at $1 million or a new trial would be granted. *Id.* The federal circuit court held that the trial court had not abused its discretion, stating:

> The court's review of the amount of a punitive damages award should involve comparison of the court's independent judgment on the appropriate amount with the jury's award to determine whether the jury's award is so excessive as to work an injustice.

Id. at 595

2. Development of Iowa Case Law

Our court has a long history of considering punitive damage cases. Recent cases have set out principles that track with the pronouncements of the Supreme Court, discussed in this opinion. In *Ryan v. Arneson*, 422 N.W.2d 491 (Iowa 1988), we compared an actual award of $120 to a punitive damage award of $18,600. Holding the punitive award not excessive, we said:

> We have stated that punitive damages must be reasonably related to actual damages. Recent cases, however, have held that punitive damages may be awarded even if actual damages were shown but never

> awarded. These cases show that our primary focus in review of a punitive damage award is the relationship between the punitive damage award and the wrongful conduct of the offending party.
>
> . . . .
>
> Although Iowa cases have discussed a relationship between actual and punitive damages, this court has expressly rejected the use of a mathematical ratio in examining punitive damages. Furthermore, Iowa cases have stated that legal precedent is of limited value in evaluating the damage award of a specific case.
>
> In determining whether punitive damages are so excessive that they demonstrate passion and prejudice on the part of the jury, we will consider whether the punitive damage award is reasonably related to the malicious conduct of the defendant which resulted in actual injury or damage to the plaintiff.

Ryan, 422 N.W.2d at 496.

In 1994, we decided *Spaur v. Owens-Corning Fiberglass Corp.*, 510 N.W.2d 854 (Iowa 1994). In this case we approved a punitive award as not being violative of due process protections, double jeopardy, or excessive fines charges. *Spaur*, 510 N.W.2d at 866-69. The awards for injuries from asbestos-containing products were $1.4 million in compensatory and $1.5 million in punitive damages. We quoted the standards of *Haslip* and applied them on the posttrial review process. *Id.* at 667.

Also in 1994, we had occasion to again consider a punitive damage award in *Ezzone*, 525 N.W.2d at 398-99. The suit involved an action against a bank for interference with shareholders' rights. Citing the Supreme Court case of *Honda Motor Co.* as establishing due process requirements, we structured our review process as follows:

> This and future reviews will be conducted on the basis of principles previously announced in punitive damages case. Awards will be tested with a view of the extent and nature of the outrageous conduct, the amount necessary for future deterrence, and with deference to the relationship between the punitive award and plaintiff's injury, as reflected in any award for compensatory damages. In addition to these traditional factors, we shall consider all circumstances surrounding the conduct and relationship between the parties. Any provocation of the conduct by plaintiff will be a factor. We take the provocation to include participation in the conduct complained of.

Ezzone, 525 N.W.2d at 399 (citing Restatement (Second) Torts § 908 cmt. e (1979)). Accordingly, the aforementioned cases provide us with guidance in reviewing the appropriateness of Wilson's punitive damage award.

3. Amount of Punitive Award

Applying these tests to the facts and the jury findings in the case at bar convinces us that an award of substantial punitive damages against IBP is warranted and is supported by the evidence and the law.

Arndt knowingly engaged in a malicious course of conduct that was in line with the climate established by IBP concerning its injured workers. Her conduct was an attempt to manipulate and interfere with the medical treatment received by Wilson and other injured workers. She was aware of and fostered this treatment of injured workers, knowing that a financial gain came to her and other management personnel thereby through IBP's safety award system. As part of this purpose, she participated in manipulating work records of injured employees which may have resulted in falsification of OSHA records. The extent and nature of the outrageous conduct is considerable when compared with other cases that have assessed the reprehensibility of defendants' acts.

The evidence indicated that Wilson's treatment as an injured worker was not a one-time or isolated instance. The interference with the diagnosis and treatment of his injury could have resulted in a pronounced worsening of an already serious condition. Other workers with injuries could be profoundly affected as a result of the policy actions carried out by Arndt and IBP. For these reasons, we find the future deterrence aspect of our reviewing principles to be of great importance. Of minor significance is the ratio between the compensatory and punitive damages assessed.

One of the factors approved by the Supreme Court and our court for assessing the imposition of punitive damages is the financial position of the defendant. This bears on the factor of deterring like conduct in the future, also accepted by both courts. *See Haslip*, 499 U.S. at 21, 111 S. Ct. at 1045, 113 L. Ed. 2d at 22; *Spaur*, 510 N.W.2d at 867 (factors 5 and 7). IBP is the largest producer of fresh beef and pork in the world. It operates eighteen separate beef or pork plants in nine states, as well as nineteen other plants, warehouses, tanneries and refineries. The company has a

sales network of ten regional and international service centers in the United States, Europe, and Asia. IBP employs 29,000 people, had net sales in 1993 of $11.6 billion and had a net worth in 1993 of $600 million.

Applying for our posttrial review process all of the factors listed as appropriate in *BMW, Haslip, Spaur, Ryan,* and *Ezzone*, we hold that the amount of punitive damages against IBP as found by the trial jury is excessive. Nevertheless, the assessment of substantial punitive damages against IBP is supported by this record. Accordingly, we hold that the judgment for plaintiff against defendants for $4000 compensatory damages is affirmed; judgment for punitive damages in favor of plaintiff against defendant IBP is affirmed in the amount of $2 million if plaintiff agrees to a remittitur of all punitive damages exceeding that amount. Consistent with the statutory directive of Iowa Code section 668A.1(2)(b), as interpreted by *Fernandez v. Curley*, 463 N.W.2d 5 (Iowa 1990), this amount shall be apportioned by judgment entries as follows:

> (1) For payment of applicable fees and costs, including plaintiff's reasonable attorney fees applicable to the recovery of the $2 million award, from the gross punitive damage award of $2 million.
>
> (2) For twenty-five percent of the $2 million award in favor of plaintiff ($500,000).

(3) For the remainder of the $2 million award after satisfying (1) and (2) apportionments to the Civil Reparations Trust Fund.

The judgments shall also include interest as provided by law. If plaintiff rejects these remittitur conditions, a new trial shall be ordered by the trial court under the conditions determined in the trial court's order of March 23, 1995, which we have described in this opinion. On the cross-appeal, we affirm except as modified by our disposition on the appeal.

We have reviewed all the issues raised by both parties and find that they are disposed of by this determination or are without merit.

Costs are assessed against defendant IBP.

AFFIRMED AS MODIFIED ON APPEAL AND REMANDED; AFFIRMED ON CROSS-APPEAL.

IN THE SUPREME COURT OF IOWA

No. 95-477

ORDER

KEVIN WILSON,
Plaintiff-Appellant/Cross-Appellee,

vs.

IBP, INC., and DIANE ARNDT,
Defendants-Appellees/Cross-Appellants.

After consideration by the court, en banc, Appellees/Cross Appellants' Petition for Rehearing in the above-captioned case is hereby overruled and denied.

Dated this 14th day of February, 1997.

THE SUPREME COURT OF IOWA

/s/ Arthur A. McGiverin
Arthur A. McGiverin, Chief Justice

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IN THE IOWA DISTRICT COURT IN AND FOR POTTAWATTAMIE COUNTY

KEVIN WILSON, Plaintiff, v. IBP, Inc. and DIANE ARNDT, Defendants.	Law No. 64900 ORDER

This matter came before the Court on the Defendants' alternative Motions for Judgment Notwithstanding the Verdict, New Trial and Remittitur. Randall J. Shanks and Laura Laubenthal Patterman appeared on behalf of the Plaintiff. Mark McCormick and Robert F. Rossiter, Jr. appeared for the Defendants. Hearing was held on February 24, 1995.

The Court having heard the arguments of counsel and after review of the Motions and accompanying briefs makes the following rulings and conclusions of law:

Conclusions of Law:

A. Subject Matter Jurisdiction

Defendants now assert that the exclusivity provisions of Iowa Code Chapter 85 deprive the Court of subject matter jurisdiction over the present dispute.

Iowa Code Section 85.20 states in relevant part,

> "The rights and remedies provided in this chapter...*for which benefits under this chapter...are recoverable,* shall be the exclusive and only rights and remedies of such employee..." (emphasis added)

Plaintiff has alleged actions for Breach of Fiduciary Duty and Slander. These are torts independent of Chapter 85. Unlike cases cited by the Defendants, such as Harned v. Farmland Foods, 331 N.W.2d 98 (Iowa 1983), there is no remedy in Chapter 85 for the alleged wrong committed by the defendants. In fact, the Harned Court found that it was "especially significant and revealing" that the Code provided a remedy for the injury alleged in that case. Id. at 99. In the present case, such as in Boylan v. American Motorists Insurance Company, 489 N.W.2d 742 (Iowa 1992), and Reedy v. White Consolidated Industries, 503 N.W.2d 601 (Iowa 1993), there is no adequate remedy provided in Chapter 85 for the alleged wrong. *See also*, 2A Larson, Worker's Compensation Law § 68.33, and Braman v. Walthall, 225 S.W.2d 342, 344-46 (Ark. 1949). Therefore, the Court concludes that the Plaintiff has alleged independent tort actions, outside the exclusivity provisions of Chapter 85, and within the Court's subject matter jurisdiction.

B. Sufficiency of Evidence

The Defendants assert that there was insufficient evidence to submit either the Breach of Fiduciary Duty claim or the Slander claim to the jury. More specifically Defendants urge that Plaintiff failed to offer evidence establishing a fiduciary relationship between himself and Diane Arndt. Defendants further contend that the Slander claim must be set aside because there was no showing of an actionable statement with defamatory meaning as understood by Dr. Hamsa.

Defendants also assert that they have established the complete defenses of "substantial proof" and "qualified privilege" as to the Slander claim.

When considering a motion for judgment notwithstanding the verdict, the court is required to review the evidence in the light most favorable to the resisting party. Every reasonable and legitimate inference that can be made must be granted to the jury's verdict. Federal Land Bank of Omaha v. Woods, 480 N.W.2d 61, 65 (Iowa 1992). If there is substantial evidence to support each element of the plaintiff's claim, then the motion for judgment notwithstanding the verdict should be denied. Dudley v. Ellis, 486 N.W.2d 281, 283 (Iowa 1992).

The Iowa Supreme Court has noted that a "fiduciary relation exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation. Kurth v. Van Horn, 380 N.W.2d 693, 695 (Iowa 1986) (quoting Restatement (Second) of Tort § 874 comment a, at 300 (1979)). The court has also approvingly cited a definition which stated that a fiduciary relationship exists "whenever one man trusts in or relies upon another." Id. (quoting Black's Law Dictionary 564 (5th ed. 1979)). Because the circumstances giving rise to such a fiduciary duty are so diverse, any such relationship must be evaluated on the facts of each individual case. Id. at 696.

In this case, as the IBP nurse, defendant Arndt in a sense was part of the medical team assisting in the treatment of the plaintiff. Plaintiff adduced testimony that tended to show that he placed trust in Diane Arndt in regards to his proper medical treatment. Some evidence also indicated that Arndt held somewhat of a supervisory role over the Plaintiff, through which she could exercise some control over his actions and the course of his treatment. There was testimony

from Arndt herself indicating that she understood that workers under her care would place their trust and confidence in her, and that she had the power to exercise influence over them. Based on these and other facts demonstrated at trial, and given the standard of review which must be employed, the Court cannot now say that the Plaintiff failed to produce sufficient evidence tending to establish a fiduciary duty between himself and Arndt, and a breach thereof.

Similarly, the Plaintiff produced sufficient evidence supporting a claim for Slander warranting submission of the issue to the jury. Generally, to prove slander a plaintiff must normally show malice and actual damages. Vinson v. Linn-Marr Community School District, 360 N.W.2d 108, 115 (Iowa 1984). However, if slander is deemed "per se" a plaintiff need not prove malice, falsity or damage to prevail in such an action. Id. Words are slander "per se" if they are of such a nature, whether true or not, that the court can presume as a matter of law that the statement will have a slanderous effect. Id. An attack on the integrity or moral character of a party, or to accuse a person of being a liar, cheater or thief may be presumed to have a slanderous effect. Spencer v. Spencer, 479 N.W.2d 293, 296 (Iowa 1991).

In this case, viewing the evidence in the light most favorable to the verdict it is possible that the jury could conclude that defendant Arndt made a false statement concerning the plaintiff's failure to abide with his doctors directions of bed rest and his apparent ability to perform work without discomfort. Furthermore, granting the plaintiff all reasonable inferences from the evidence produced at trial, a trier of fact could find that the statements were meant to indicate that the plaintiff was faking his injury or that possibly he was not injured to the degree claimed, and that the doctor understood the statement to be such an expression.

In the context in which it was spoken, such a statement could be deemed as an attack on the moral integrity and honesty of the plaintiff, and thereby presumed to have a slanderous effect. Viewing the evidence in the light most favorable to the plaintiff, and granting him every reasonable inference from the evidence produced, defendant Arndt's statement could constitute slander "per se".

Finally, the defendants failed to prove either the defense of "substantial truth" or "qualified privilege". Viewing the evidence in the light most favorable to the verdict it can clearly be found that Arndt's statement to Dr. Hamsa was false. Plaintiff was not working on his car or "messing around" in the sense that Arndt was communicating to Dr. Hamsa. Furthermore, the mere fact that Plaintiff had been out driving his car to pay bills, run errands, and take his children places, does not mean the Defendants established the substantial truth of Arndt's statements. Evidence was adduced at trial that these activities were necessary and even expected or reasonably anticipated by Arndt, and were not the type of activities Arndt referred to in her conversation with Dr. Hamsa. The defense of truth has not been established as a matter of law, and therefore the jury's rejection of it must stand.

Defendants Motion for Directed Verdict did not raise the question of "qualified privilege". The Defendants may only assert those grounds previously asserted in their Motion for Directed Verdict in a Motion for Judgment Notwithstanding the Verdict. Federal Land Bank of Omaha v. Woods, 480 N.W.2d at 65. As a result, the Defendants failed to properly preserve objection on the defense of "qualified privilege." Assuming arguendo objection was preserved, the Defendants failed to establish the defense as a matter of law.

C. Adequacy of Evidence of Damages

Instruction 16 allowed the jury to award damages to Wilson for general damages that are presumed to result from the communication of a slanderous statement, loss or reputation, and past and future mental pain and suffering. Defense counsel had previously failed to specifically object to Instruction 16 which addressed the determination of Plaintiff's damages. The only objection made was a general one as to the sufficiency of the evidence. Any other objection to the instruction on damages has thereby been waived.

The Court finds that there was sufficient evidence on the question of damages to submit the question to the jury. The fact that Plaintiff might not have had the greatest reputation to begin with or that he did not get along with some people does not mean that he did not suffer any damages from the communication of the slanderous statement. At the very least there was evidence tending to indicate that Plaintiff had a stable, good relationship with Dr. Hamsa prior to the communication. This relationship was disrupted when Plaintiff was confronted with the statements made by Diane Arndt. Evidence also supports the conclusion that Plaintiff suffered a loss of reputation (at least in the eyes of Dr. Hamsa who believed Plaintiff had lied to him) as a result of the communication. Sufficient evidence exists to support submission of the damage claim and the jury's verdict.

D. Sufficiency of Evidence Regarding Entitlement to Punitive Damages.

The Court again notes the standard it must utilize in addressing a motion for judgment notwithstanding the verdict. The Court is required to review the evidence in the light most favorable to the verdict, and grant every reasonable inference to the jury's determination.

The Court finds that there was sufficient evidence to submit the question of whether defendant Arndt's conduct amounted to a willful and wanton disregard to the rights and safety of another, thereby entitling the plaintiff to punitive damages. Plaintiff adduced evidence at trial tending to demonstrate that Arndt generally disliked and disbelieved many of the workers that came to her. Evidence also existed which could be interpreted as showing that Arndt and IBP tried to keep worker's compensation claims to a minimum, and that Arndt and other management employees profited from reducing such claims and the extent of treatment. There was also evidence from which one could conclude that Arndt's statements were meant to influence Dr. Hamsa into administering a more conservative care approach to the plaintiff. Based on this and other evidence produced by the plaintiff, there was sufficient evidence to warrant submission of the punitive damage claim and to uphold an award of such damages.

E. Validity of Punitive Damage Instructions.

The defendants now object to the form of the jury instructions given with regard to punitive damages. Defendants claim that the punitive damage award was either solely against Arndt or fatally ambiguous.

The Court finds that any objection to the form of the jury instructions has been waived. No specific objection to the form of the instruction was made by the defendant prior to their being given to the jury. The failure to make a specific, timely objection resulted in a waiver of the argument. Hoekstra v. Farm Bureau Mut. Ins. Co., 382 N.W.2d 100, 107 (Iowa 1986). The instructions, whether erroneous or not, became the law of the case once they were submitted without specific objection as to their form. *See, e.g.*, Kiner v. Reliance Ins. Co., 463 N.W.2d 9, 14 (Iowa 1990); and

Clausen v. R.W. Gilbert Construction Co., 309 N.W.2d 462, 467 (Iowa 1981).

Moreover, the Court finds that the punitive damage award was clearly against IBP. When read as a whole, the instructions reflect that IBP was to be liable for any punitive damages awarded based on defendant Arndt's conduct. Additionally, both Plaintiff's and Defendants' trial counsel tried and submitted the question of punitive damages on the theory that IBP would be solely liable for any such award.

F. Excessiveness of Punitive Damages.

Recent decisions by both the Iowa Supreme Court and the United States Supreme Court reflect an increasing tendency to scrutinize the amount of punitive damage awards. The United States Supreme Court recognized in TXO Production v. Alliance Resources, 113 S.Ct. 2711 (1993), that the constitution imposes a substantive limit on the size of punitive damage awards, and that some awards may be so grossly disproportionate to the potential harm of the defendant's conduct so as to violate due process. The Iowa Supreme Court also stated in Ezzone v. Riccardi, that punitive damage awards should be tested with "a view of the extent and nature of the outrageous conduct, the amount necessary for future deterrence, and with deference to the relationship between the punitive award and plaintiff's injury, as reflected in any award for compensatory damages." 525 N.W.2d 388, 399 (Iowa 1994); *see also* Honda Motor Co. v. Oberg, 114 S.Ct. 2331 (1994); and Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1 (1991).

In the present case, damages in the amount of Fifteen Million Dollars ($15,000,000.00) are grossly excessive and bear no reasonable relation to the Plaintiff's actual damages. Plaintiff's actual damages, as determined by the jury's compensatory award, were only Four Thousand Dollars

($4,000.00). The court must also keep in mind that the award of punitive damages is based upon the conduct "from which the claim arose." *See, e.g.*, Coster v. Crookham, 468 N.W.2d 802, 810 (Iowa 1991); and Burke v. Deere & Co., 6 F.3d 497, 507, 511 (8th Cir. 1993). The willful and wanton conduct engaged in by the defendants in regard to their treatment of the plaintiff in this case is not so egregious to warrant such a large award. Quite simply, an award of $15,000,000.00 does not bear any reasonable relation to the harm or even the potential harm to the defendant resulting from the statements of defendant Arndt to Dr. Hamsa.

The Court, therefore, concludes that Remittitur of damages is necessary. The Court will order the Plaintiff's Punitive Damages be remitted to the amount of One Hundred Thousand Dollars ($100,000.00). This sum is 25 times the amount of the Plaintiff's actual damages, according to the jury's compensatory damage award. An amount 25 times the actual damage award reflects a more reasonable relation between the two awards and still succeeds in punishing the defendant and deterring future similar conduct.

G. Conditional New Trial.

The trial court has the inherent power to grant a new trial where the verdict fails to administer substantial justice between the parties. Lehigh Clay Products v. Iowa D.O.T., 512 N.W.2d 541, 543 (Iowa 1994). The court finds that the Fifteen Million Dollar Verdict is so large and disproportionate to the Plaintiff's underlying actual damages that it is grossly excessive and likely the result of passion or prejudice on the part of the jury. A new trial, however, shall only be granted as to the amount of punitive damages. *See, e.g.*, Thomas v. Allen, 03 N.W.2d 400, 401 (Iowa 1993) (issue of liability need not be resubmitted on remand, even though new trial on damages is warranted, where there is no evidence that the jury's determination of fault was

compromised or affected by the evidence of damages). Therefore, should the Plaintiff decide not the accept the Court's Remittitur of Damages, the Defendants' Motion for a New Trial will be granted on the grounds that the verdict fails to administer substantial justice between the parties.

IT IS THEREFORE THE ORDER OF THE COURT that Plaintiff's punitive damages shall be Remitted to the sum of One Hundred Thousand Dollars ($100,000.00). Plaintiff shall have ten (10) days from the filing of this Order to accept the aforementioned sum. If Plaintiff fails to accept the Remittitur within the specified time, Defendants' Motion for New Trial shall be granted as to the issue of punitive damages only. All other motions of Defendants are hereby overruled.

Dated, March 2nd, 1995.

/s/ James M. Richardson
JAMES M. RICHARDSON
Judge, Fourth Judicial District

IN THE IOWA DISTRICT COURT FOR
POTTAWATTAMIE COUNTY

KEVIN WILSON, Plaintiff, v. IBP, Inc. and DIANE ARNDT, Defendants.	Law No. 64900 JUDGMENT ENTRY

This matter came before the Court on April 22, 1997 pursuant to Plaintiff's motion for entry of judgment. Present were David L. Brown for the plaintiff, Mark McCormick for the defendant and Assistant Attorney General Richard Mull for the Civil Reparations Trust Fund. The Civil Reparations Trust Fund is granted permission to intervene. After review of the court file, the opinion of the Iowa Supreme Court rendered in this matter on December 18, 1996, the pleadings and brief filed and served subsequent to Procedendo issuing, and the arguments of counsel, the Court enters judgment as follows:

1. $4000.00 compensatory damages, plus 10% per annum interest from the date the petition in this matter was filed, February 16, 1993 as provided by Iowa Code § 535.3.

2. $2,000,000.00 punitive damages, plus 10% per annum interest from the date of the jury verdict, December 2, 1994 as provided by Iowa Code §§ 535.3 and 625.21 to be distributed according to

the determination of the Iowa Supreme Court as follows:

a. Forty percent (40%) of the total punitive damage award together with interest in the amount of 10% per annum from the date of verdict, December 2, 1994, to attorney's fees.

b. Twenty-five percent (25%) of the total punitive damage award ($500,000) together with interest in the amount of 10% per annum from date of verdict, December 2, 1994 to plaintiff.

c. The remainder, together with interest in the amount of 10% per annum from date of verdict, December 2, 1994, to the Civil Reparations Trust Fund after satisfying 2(a) and 2(b).

All court costs are assessed against defendant IBP.

Entered this 25th day of April, 1997.

/s/ James M. Richardson
JUDGE, FOURTH JUDICIAL DISTRICT

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Supreme Court, U.S.
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(2)

No. 96-1813

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

IBP, Inc. and Diane Arndt,
Petitioners,

v.

Kevin Wilson,
Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of Iowa

BRIEF IN OPPOSITION

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36 pp

Counter-Statement of Questions Presented

I. **Whether the Supreme Court of Iowa correctly applied BMW v. Gore, 134 L.Ed.2d 809 (1996), to fix punitive damages at $2 million given the intentional threat of physical harm to Respondent's health and safety from Petitioner's conduct?**

II. **Whether Petitioners' claim that receipt by the State Civil Reparations Trust Fund of a portion of the punitive damage award under Iowa Code § 668A.1(2)(b) violates due process is properly before the Court when it was not raised in the State courts?**

Parties Involved and Rule 29.6 Statement

Following the decision below, the Civil Reparations Trust Fund was granted permission to intervene. (App. p. 47a) The Trust Fund is created pursuant to Iowa Code § 668A.1(2)(b) (1995) and is under the control of the Governor and four other elected executive officers of the State of Iowa. Iowa Code § 7D.1 (1995) Funds are disbursed only for indigent civil litigation or insurance assistance programs. Iowa Code § 668A.1(2)(b) (1995).

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No. 96-1813

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

IBP, Inc. and Diane Arndt,
Petitioners,

v.

Kevin Wilson,
Respondent,

On Petition for Writ of Certiorari
to the Supreme Court of Iowa

BRIEF IN OPPOSITION

Respondent Kevin Wilson (hereinafter "Wilson") respectfully opposes the Petition for Writ of Certiorari to the Supreme Court of Iowa.

Statutory Provision Involved

Iowa Code § 668A.1 (1995) Punitive or exemplary damages

1. In a trial of a claim involving the request for punitive or exemplary damages, the court shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating all of the following:

a. Whether, by a preponderance of clear, convincing, and satisfactory evidence, the conduct of the defendant from which the claim arose constituted willful and wanton disregard for the rights or safety of another.

b. Whether the conduct of the defendant was directed specifically at the claimant, or at the person from which the claimant's claim is derived.

2. An award for punitive or exemplary damages shall not be made unless the answer or finding pursuant to subsection 1, paragraph "a", is affirmative. If such answer or finding is affirmative, the jury or court if there is no jury, shall fix the amount of punitive or exemplary damages to be awarded, and such damagers shall be ordered paid as follows:

a. If the answer or finding pursuant to subsection 1, paragraph "b", is affirmative, the full amount of the punitive or exemplary damages awarded shall be paid to the claimant.

b. If the answer or finding pursuant to subsection 1, paragraph "b", is negative, after payment of all applicable costs and fees, an amount not to exceed twenty-five percent of the punitive or exemplary damages awarded may be ordered paid to the claimant, with the remainder of the award to be ordered paid into a civil reparations trust fund administered by the state court administrator. Funds placed in the civil reparations trust shall be under the control and supervision of the executive council, and shall be disbursed only for purposes of indigent civil litigation programs or insurance assistance programs.

3. [This provision relating to discovery of defendant's wealth is omitted.]

Statement of the Case

Course of proceedings below

On May 27, 1997, IBP filed a notice of appeal to the

Supreme Court of Iowa from the entry of judgment in the Iowa District Court for Pottawattamie County dated April 30, 1997. A copy of the notice of appeal from the judgment entry is reprinted in the appendix to this brief in opposition.

Factual Background

Pursuant to Supreme Court Rule 15(2), Wilson objects to the factual summary presented by IBP.

The Supreme Court of Iowa determined that IBP had engaged in a course of willful and wanton conduct which threatened the health and safety of Wilson. (Slip. Op. at Petitioner's Appendix p. 21a-22a) (hereinafter "App.") This conduct was part of a larger practice of manipulating the health care received by injured employees by using economic pressure to force doctors to avoid expensive procedures and high disability ratings, punishing employees who complained about their treatment, and falsifying reports of injuries in internal reporting and to the Occupational Health and Safety Administration. (App. p. 21a-22a)

IBP, a self-insured employer under the Iowa Workers' Compensation Act, began its control over the treatment of injured employees by selecting only those doctors who were "ultra-conservative," meaning they would avoid surgery. (App. p. 21a) Surgical procedures are expensive themselves and often mean that the worker will be assigned a disability rating which is compensable under the workers' compensation system. (App. p. 21a)

After this selection process occurred, IBP would pressure doctors to limit treatment costs by refusing to refer new patients to doctors who did not prescribe inexpensive treatment. Specifically, one of Wilson's treating doctors, Dr. Agarwal, lost all referrals because he was not conservative enough in his treatment. He met with IBP and agreed to be more conservative in exchange for future referrals. (Tr. pp.

70-74) Dr. Agarwal was ultimately fired by IBP for ordering too many surgeries, but at the time he saw Wilson he was still in the good graces of IBP. (Tr. pp. 73-76, 101)

Diane Arndt was the IBP employee who was responsible for administering this workers' compensation program. Following his back injury, Wilson was sent to Dr. Agarwal who initially prescribed only bed rest. (App. p. 2a) After complaining about the lack of treatment, Wilson was sent to Dr. Hamsa. (Tr. pp. 101, 25) Although Arndt admitted at trial that she knew the injury was legitimate, when she learned that Dr. Hamsa ordered Wilson off work for two more weeks, her response was, "we'll see about that." (App. p. 19a)

After Wilson's condition failed to improve, Dr. Hamsa ordered three more weeks of bed rest with the understanding that without improvement, surgery would be necessary. (App. p. 19a) It was at this time, the Supreme Court of Iowa determined, that Arndt made good on her promise and intervened to avoid this increased expenditure. In a telephone conversation Arndt told Dr. Hamsa that IBP had videotaped Wilson "working on his car and out doing other activities without any apparent distress." (App. p. 19a) Of course, no such tape existed[1], Arndt knew this, admitted as much to her co-worker, Karen Beam, and intended with

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[1] Although IBP refers to a video tape existing (Pet. p. 13, n. 4), this is not a videotape showing what Arndt claimed. IBP denied during discovery that any videotape existed. (Tr. 235-36, Ex. 13) About four weeks before trial IBP produced a tape showing Wilson walking (which was consistent with doctor's orders), but not doing any strenuous activity. (Ex. 17) There was no date imprinted on the tape or any report generated to show when the videotape was made. (Tr. pp. 229-30) There was sufficient evidence for the jury to conclude that IBP had fabricated this videotape for the purpose of furthering the "cover-up." This conduct, therefore, is certainly relevant to determining an appropriate sanction through a punitive damage award.

her deception to stop Wilson from getting needed surgery. The Supreme Court of Iowa expressly found that "Arndt knew this was a lie" regarding her statement to Dr. Hamsa. (App. p. 19a)

Karen Beam testified that Arndt asked her, after Wilson had hired a lawyer, to help create a cover-up story about confusing Wilson's case with another where a videotape existed. (App. at 20a-21a) Beam also warned Arndt about the dangers of interfering with medical treatment, but Arndt assured her that Dr. Hamsa would not mention the conversation. (App. at 20a)

Arndt admitted at trial that her lie "assisted" a change in Dr. Hamsa's plan of treatment for Wilson. (App. p. 20a) Dr. Hamsa confronted Wilson and accused him of lying. (Tr. pp. 32, 41, 46) Dr. Hamsa thereafter advised against surgery, ordered Wilson back to light duty, (Tr. pp. 91, 273, 276) and refused to provide any further treatment for the back injury. (Tr. pp. 36, 47, 287-88)

Wilson was ultimately treated by a neurosurgeon who performed surgery to correct the ruptured disc and impinged nerve condition. (Tr. pp. 35-38) Wilson settled his workers' compensation claim and instituted the case at bar seeking damages for breach of fiduciary duty and defamation.

At trial in the Iowa District Court IBP chose to present no evidence in its defense. (Tr. p. 322) The jury determined that IBP's actions toward Wilson were not isolated, but part of IBP's program to reduce workers' compensation costs. A "safety award system" had been instituted whereby employees of divisions of IBP with low injury statistics would receive gifts or cash bonuses. (App. p. 20a) One way in which statistics were improved was to require employees to punch in at work soon after being disabled by an injury. (App. p. 20a-21a) Although the employee would then return home to convalesce, these days would not be counted as lost due to injury. Wilson, for

example, was ordered in to work only three days after rupturing a disc in his back. (App. p. 21a) The Supreme Court of Iowa found that IBP required other workers to punch in on the same day as having surgery, (App. p. 21a) or the day after having his finger amputated. (App. p. 21a)

This practice of falsifying records carried over to illegally under reporting lost days to OSHA and reporting injuries incorrectly in internal documents so that they would not have to be forwarded to OSHA under applicable regulations. (App p. 21a)

IBP's callous attitude toward its employees was demonstrated by Arndt's "openly low opinion of workers, referring to them as 'idiots' and 'jerks.' She made remarks to doctors that other injured IBP workers were lying about their injuries," (App. p. 20a) and told treating physicians that "this guy's full of shit." (App. p. 20a.)

One method to encourage employee submission to IBP was to force those workers who complained about treatment decisions to work unpleasant light duty jobs including watching gauges in the rendering plant (where animal parts are boiled to produce byproducts). (App. p. 22a) The monotony of the work was compounded by the terrible smell associated with this type of animal processing. (App. p. 22a)

As the Supreme Court of Iowa stated:

> This climate of suspicion toward the legitimacy of injuries to workers and their treatment, well known to Arndt, could be found by a reasonable juror to corroborate a finding of willful and wanton disregard for the rights and safety of Wilson.

(App p. 22a)

The application of BMW of North America v. Gore,

134 L.Ed.2d 809 (1996), must be considered against this factual background and in light of the decision by the Supreme Court of Iowa to order a remittitur of $13 million (striking nearly 87% of the jury's award) based on both Gore and state law principles. Although certainly under these facts, IBP's deliberate and harmful conduct would have justified a substantially higher award than $2 million, the decision by the Supreme Court of Iowa is well within the due process parameters of Gore.

Reasons for Denying the Writ

A. The Supreme Court of Iowa Correctly Applied BMW v. Gore

Supreme Court Rule 10 provides:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons....A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

The Petition does nothing more than dispute how the Supreme Court of Iowa found facts and applied Gore. Under the long-established standards of this Court, these grounds do not give rise to a compelling reason to grant the writ.

This Court announced three principles in Gore which guide an inquiry into whether an award of punitive damages has been rendered consistent with the Due Process Clause of the Fourteenth Amendment. These settled principles of law were applied in the decision below after a thoughtful review

of the facts in the record.

First, a state may not allow a jury verdict which punishes conduct occurring in another state. Gore, 134 L.Ed.2d at 825. Of concern in Gore was that the disclosure policy at issue in the suit was legal in many other jurisdictions. Unlike in Gore, IBP's conduct would be tortious in any jurisdiction. Furthermore, conduct which occurred outside the state may be properly considered in "the determination of the degree of reprehensibility of the defendant's conduct." Id. at 825, n. 21

All of the tortious conduct suffered by Wilson was perpetrated in Iowa. IBP made no objection to the jurisdictional nature of the evidence at trial or on appeal to the Supreme Court of Iowa.

Second, the defendant must receive fair notice of what conduct will subject him to punishment. Although there was some question in Gore regarding the different types of disclosure laws in the several States, there can be no doubt that IBP was aware that a breach of fiduciary duty and defamation would subject it to liability. Iowa Code § 668A.1(1)(a) provides for punitive damages based on conduct "constitut[ing] willful and wanton disregard for the rights or safety of another." A similar statute was found by the Tenth Circuit to provide sufficient notice of the possibility of punitive damages in a case involving interference with contractual relationships and prospective business advantage. Continental Trend Resources, Inc. v. OXY USA, Inc., 101 F.3d 634, 638 (10th Cir. 1996), *cert. denied* (Docket No. 96-1546, May 27, 1997).

The third factor is whether the defendant has notice of the severity of the punitive damage award which may result. Gore, 134 L.Ed.2d at 826. Three "guideposts" are set forth to analyze: the degree of reprehensibility of the defendant's conduct, the ratio of the punitive award to the actual harm inflicted on the plaintiff, and the comparison

between the punitive award and the civil or criminal penalties that could be imposed for comparable misconduct. Id.

The degree of reprehensibility supports the decision below

The Court in Gore identified the degree of wrongdoing as "perhaps the most important indicum of the reasonableness of a punitive damage award." Id. at 826. "This principle reflects the accepted view that some wrongs are more blameworthy than others." Id. "The flagrancy of the misconduct is thought to be the primary consideration in determining the amount of punitive damages." Id. at n. 23 (citing Owen, A Punitive Damages Overview: Functions, Problems and Reform, 39 Vill. L. Rev. 363, 387 (1994)).

The Gore decision also noted that Dr. Gore suffered "purely economic" damages. Id. at 827. The conduct did not "effect [the] performance or safety features, or even its appearance for at least nine months after his purchase. BMW's conduct evinced no indifference to or reckless disregard for the health and safety of others." Id. Factors such as "trickery and deceit" and "intentional malice" were also cited as allowing for higher punitive damage awards consistent with due process requirements. Id.

In every way which BMW's conduct could be characterized as less wrongful, IBP's is more so. The harm here was physical, not just economic. IBP lied deliberately about a critical fact, whereas BMW believed the damage to the car was immaterial as a matter of law. This is not a case of a doctor with a damaged luxury car; it is of an injured worker in need of medical care who was victimized by a corporate policy of deception and abuse. The difference is stark and cries out for a remedy.

The Tenth Circuit, applying the Gore decision, summarized the analysis of the level of misconduct as an

inquiry into:

> whether a defendant's behavior: causes economic rather than physical harm; would be considered unlawful in all states; involves repeated acts rather than a single one; is intentional; involves deliberate false statements rather than omissions; and is aimed at a vulnerable target.

OXY, 101 F.3d at 638.

Applying this analysis to the facts at bar demonstrates the reasonableness of the decision of the Supreme Court of Iowa. IBP caused physical harm in the manipulation of the medical care provided Wilson by delaying his needed back surgery. Although Wilson was fortunate that his disc did not rupture further and cause more neurological problems during IBP's period of malfeasance, the type of conduct is markedly more serious than the loss of value in a luxury car.

The tortious behavior in this case is recognized as wrongful in every jurisdiction. The Court in Gore was concerned that BMW was punished for a disclosure policy which was legal in many states. Such is not a concern here.

The record demonstrates a pattern of conduct by IBP in pursuing lower workers' compensation expenditures regardless of the human cost. The Supreme Court of Iowa determined:

> The evidence indicated that Wilson's treatment as an injured worker was not a one-time or isolated instance. The interference with the diagnosis and treatment of his injury could have resulted in a pronounced worsening of an already serious condition. Other workers with injuries could be profoundly affected as a

> result of the policy actions carried out by Arndt and IBP.

(App. p. 32a) This case is squarely within the concept of "repeated acts" of wrongdoing and merits a higher award.

The conduct here was intentional as well, both in the implementation of the general business policy and in the deliberate falsehood told by Arndt to Dr. Hamsa. Although the specific nature of the deliberate conduct in OXY consisted of business torts rather than slander, there is nothing in that case to suggest a distinction between these types of misconduct.

Finally, IBP's actions were aimed at a highly vulnerable target. Aside from the manifest imbalance of power associated with the employee-employer relationship, IBP enjoyed statutory authority to control Wilson's medical care through the workers' compensation system. See, Iowa Code § 85.27 (1995). Furthermore, the jury determined that a fiduciary relationship existed between Arndt and Wilson at the time she lied to Dr. Hamsa. (App. pp. 9a-10a) It is also worth noting that the OXY court found vulnerable plaintiffs in the business competitors with the larger defendants. OXY, 101 F.3d at 639. As an individual, Wilson is even more vulnerable under this standard.

The flagrant misconduct of IBP is markedly different from the business decision made by BMW. When presented with the understandably difficult task of explaining away this damaging factor, IBP does nothing more than ignore the factual findings made by the jury, ignore the express statements of the Supreme Court of Iowa as to the state of the appellate record, and ignore those factors which were relevant in finding egregious conduct meriting a severe punishment.

For example, IBP goes on at length citing cases approving of the practice of putting injured workers under

surveillance. (Pet. pp. 11-12) IBP ignores the fact that there was no surveillance of Wilson which showed him violating his restrictions. It was the lie that was told about the existence of a videotape showing such a violation which lead to the decision here, not the idea of surveillance in general. IBP's argument is nothing more than a "red herring."

IBP attempts to cast the statements by Arndt to Dr. Hamsa as being "in large part true." (Pet. p. 11) IBP fails, again, to tell the whole story. The Supreme Court of Iowa specifically rejected the argument that the "gist or sting" of the defamatory statement was true:

> We agree with the trial court in that the essence of the alleged defamatory statement was that Wilson was faking the severity of his injury and was being untruthful to his doctor, *i.e.*, that he was a liar. It was not, as defendants suggest, that he was working on his car or driving his children to school.

(App. p. 13a)

This deception is made worse by the attempt to smear Wilson further by throwing in the fact that he was in jail during part of the time he was on medical restrictions. The trial court sustained the motion in limine made by the plaintiffs but allowed IBP to present evidence on a violation. The trial court simply ruled that the location of the alleged violation could not be mentioned.

IBP cannot avoid the fact that its version of events was not believed by the jury or the Supreme Court of Iowa. Nor can it ignore that the record which stands before this Court paints a damning picture of IBP's conduct, conduct which threatened the health and safety of Wilson and every other employee of IBP. This most important factor in determining reasonableness has been satisfied many times over.

Ratio alone is not determinative

IBP fundamentally misreads Gore by its reliance on the ratio factor as grounds for summary reversal. Gore does not require a particular ratio as the upper constitutional limit in isolation from other facts in the case. In fact, the Gore decision recognized that "low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages." Gore, 134 L.Ed.2d at 831. The Court also stated it:

> cannot draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say however that [a] general concer[n] of reasonableness ... properly enter[s] into the constitutional calculus.

Id. (citing Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991)). The 500:1 ratio present in this case is of little use in assessing the constitutionality of the decision below.

The Seventh Circuit recognized the difficulty in applying ratio analysis in a civil rights action where each plaintiff received $5,000 in compensatory damages and $60,000 in punitive damages:

> The smaller the compensatory damages, the higher the ratio of punitive to compensatory damages has to be in order to fulfill the objectives of awarding punitive damages ...
>
> The compensatory damages were low here in part because of the inherent difficulties of

> fixing a dollar equivalent for subjective injuries, such as fright and pain. An award of punitive damages proportioned to the low compensatory damages that were awarded would have a very meager deterrent effect, would fail to signal to the prison authorities that savage treatment of prisoners will not be tolerated, and would not be commensurate with the moral gravity of the defendant's action.

Cooper v. Casey, 97 F.3d 914, 919-20 (7th Cir. 1996) (Posner, J.) (internal citations omitted).

The Second Circuit applied similar logic in another civil rights claim, one based on malicious prosecution, where the jury awarded $1 compensatory damages and $200,000 in punitive damages.

The court stated:

> In Gore, a 500 to 1 ratio was "breathtaking." However, in a § 1983 case in which the compensatory damages are nominal, a much higher ratio can be contemplated while maintaining normal respiration. Since the use of a multiplier to assess punitive damages is not the best tool here, we must look to the punitive damages awards in other civil rights cases to find limits and proportions.

Lee v. Edwards, 101 F.3d 805, 811 (2d Cir. 1996). The court, after analyzing other awards in civil rights cases and the manner in which the jury had been instructed on who would pay the damages, ordered a remittitur of $125,000.

It should be noted that this 75,000 to 1 ratio was approved in a case where the malicious prosecution claim

"entailed little overt violence" and was based on a detention of two hours. Id. at 810. "[T]he jury ... was obviously unimpressed by Lee's claim to have suffered harm...." Id.

IBP is highly critical of the Supreme Court of Iowa's statement that the ratio was of "minor significance." (Pet. p. 14) IBP fails to recognize, however, that the Gore decision emphasized the degree of reprehensibility factor and qualified the application of ratio analysis when a low award of compensatory damages is based on an egregious act causing little economic harm. This is exactly the case at bar. The reduction of the $15 million award to a 500:1 ratio is therefore entirely consistent with Gore, and, indeed, a higher ratio would be justified given IBP's actions here. No valid basis to overturn the methodical review of previous punitive damage cases by the Supreme Court of Iowa has been demonstrated.

There are no statutory sanctions which can be compared to IBP's misconduct

In Gore, the Court was able to compare the punitive damage award to the consumer protection measures of Alabama law which provided penalties for non-disclosure of damage to a new car before safe. Here, however, the conduct at issue is not covered by any statutory measure because IBP violated common law tort duties. IBP has cited no provision of the Iowa Code or Iowa Administrative Code which, if applied to this case, would provide an adequate remedy for its misconduct. This factual difference limits the applicability of the third Gore factor.

As the Tenth Circuit stated when faced with the same issue:

> OXY's misconduct involved a violation of common law tort duties that do not lend

> themselves to a comparison with statutory penalties. The fundamental question is whether OXY had reasonable notice that its tortious interference with contracts and prospective business advantage could result in such a large punitive award.

OXY, 101 F.3d at 641.

The problem with IBP's analysis, as already stated, is that the wrongs committed here were not statutory in nature. The common law, not the Iowa legislature, provides the remedy to IBP's actions. IBP cannot possibly claim that they did not know manipulating with medical care, defamation and maintaining a culture of lying could result in a significant jury verdict.

The Gore Concurrence supports the decision below

The three concurring Justices in Gore recognized that if "fair procedures were followed, a judgment that is a product of that process is entitled to a strong presumption of validity." Gore, 134 L.Ed.2d at 833 (Breyer, J., concurring). This system of fair procedures, "need not be precise;" however, it "must offer some kind of constraint upon a jury or court's discretion, and thus protection against purely arbitrary behavior." Id. at 834.

IBP expressly accuses the Supreme Court of Iowa of being blind to previous decisions of that court in determining that a $13 million remittitur was warranted. (Pet. p. 14) IBP's disrespectful argument that this unanimous, en banc, decision of the Supreme Court of Iowa ignored the law of Iowa is flatly inconsistent with the state law standards expressed by the court:

> In 1994, we decided Spaur .... We quoted the standards of Haslip and applied them on the posttrial review process. Id. at 867. Also in 1994, we had occasion to again consider a punitive damage award in Ezzone [v. Riccardi, 525 N.W.2d 388 (Iowa 1994)]. The suit involved an action against a bank for interference with shareholders' rights. Citing the Supreme Court case of Honda Motor Co. [v. Oberg, 512 U.S. 415 (1994)] as establishing due process requirements, we structured our review process as follows: ...
>
> Awards will be tested with a view of the extent and nature of the outrageous conduct, the amount necessary for future deterrence, and with deference to the relationship between the punitive award and plaintiff's injury, as reflected in any award for compensatory damages. In addition to these traditional factors, we shall consider all circumstances surrounding the conduct and relationship between the parties. Any provocation of the conduct by plaintiff will be a factor. We take the provocation to include participation in the conduct complained of.

(App. pp. 30a-31a)

The decision below was based on a comprehensive review of both federal and state law concerning punitive damages. IBP has couched its reasons for granting the writ in broad and argumentative terms without any showing of how the presumption of validity is overcome in this case. The Court should properly deny the petition as the Supreme Court of Iowa has faithfully applied due process analysis in ordering a remittitur of $13 million already and in so doing

set a level of punitive damages which reflects the outrageous conduct of IBP.

The need for deterrence supports the decision below

The Court in Gore recognized that when a "defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful [it] would provide relevant support for an argument that strong medicine is required to cure the defendant's disrespect for the law." Gore, 134 L.Ed.2d at 827. IBP's actions here were found by the Supreme Court of Iowa to be part of a repeated pattern of unlawful conduct and that the deterrent effect of punitive damages would be well served here. (App. p. 32a)

IBP argues that the use of the defendant's wealth by the Iowa court to aid in the determination of what level of punitive damages would be reasonable was inconsistent with Gore. (Pet. pp. 15-16) The Gore opinion simply held that a defendant's size does not alter the requirement of fair notice. "While each State has ample power to protect its own consumers, none may use the punitive damages deterrent as a means of imposing its regulatory policies on the Nation." Id. at 833.

Here, however, the size of the defendant is not being used to justify a lack of fair notice, it is being used to determine what is fair punishment. As the Tenth Circuit stated:

> From [Gore] we conclude that a large punitive award against a large corporate defendant may not be upheld on the basis that it is only one percent of its net worth or a week's corporate profits. Yet wealth must remain relevant, because $50,000 may be awesome punishment

> for an impecunious individual defendant but wholly insufficient to influence the behavior of a prosperous corporation....
>
> A rich defendant may act oppressively and force or prolong litigation simply because it can afford to do so and a plaintiff may not be able to bear the costs and the delay. We have held that the costs of litigation to vindicate rights is an appropriate element to consider in justifying a punitive damages award.

OXY, 101 F.3d at 641-42 (citations omitted). A substantial award of punitive damages is the only way to get the attention of IBP and have it realize its pattern of abusive conduct was and is completely unacceptable.

B. The Petition depends on resolution of disputed issues of fact and application of settled law to facts

Much of Petitioners' disagreement with the decision below rests on disputed assertions of fact. The Petition, for example, criticizes the Supreme Court of Iowa's conclusion that IBP's treatment of Wilson was "not a one-time or isolated instance." (Pet. p. 12) It complains of other claimed factual inaccuracies in the decision below. (Pet. p 13, n. 4) Although the Petition seeks to couch this argument in an assertion that the lower court "flouted" the guidelines in Gore (Pet. p. 10), the heart of Petitioners' argument is that the record does not support the Supreme Court of Iowa's application of the Gore factors to the facts of the case. (Pet. pp. 10-16)

The court found that IBP created a "climate of suspicion toward the legitimacy of injuries to workers and

their treatment" which a reasonable juror could find corroborated a finding of "willful and wanton disregard for the rights and safety of Wilson." (App. p. 22a) Yet, IBP characterizes Arndt's statements as "allegedly slanderous," being "in large part true," and claims that the conduct at issues was simply "legal conduct designed to preclude workers' compensation waste and fraud." (Pet. pp. 10-11)

Note four on page 13 of the Petition complains about "several fundamental inaccuracies" in the facts of the case. The issue of the videotape, however, was fully addressed by the decision below. The Supreme Court of Iowa found that there was never any videotape showing a violation of restrictions by Wilson. (App. p. 19a) (See, supra p. 4, n. 1) The remaining inaccuracy alleged by IBP is that Karen Beam was not really a nurse. IBP fails to cite any decision of this Court suggesting that it will grant a writ of certiorari, much less a summary reversal, on the basis of this kind of allegation of error. No compelling basis exists under Supreme Court Rule 10 for the exercise of the Court's judicial discretion when the claim of error is founded on factual determinations, especially those which are immaterial to the real issue of how IBP threatened Wilson's health and safety.

C. The decision below is consistent with other federal and state cases

IBP cites several cases in which Gore was applied to reduce punitive damage awards. None of the cases cited involve the type of wrongdoing involved in the case at bar. IBP was found to have engaged in conduct which threatened health and safety in addition to defaming Wilson. IBP offers cases dealing with business torts or, at worst, discrimination claims. Not one even remotely approaches IBP's misdeeds.

Furthermore, the above argument demonstrates that

each case must be carefully analyzed on its own merits to determine if the award violates the due process clause. There is no meaningful way for IBP to summarize each case in a few words or sentences and compare it to the instant case. Indeed, the Gore opinion stresses that due process analysis cannot be reduced to a bare comparison to previous punitive damage cases. Gore, 134 L.Ed.2d at n. 37.

D. IBP has not preserved error regarding its claim of a due process violation in the receipt of some of the punitive damages awarded to the Civil Reparations Trust Fund

IBP's argument that the provisions of Iowa Code § 668A.1 which require apportionment to the state's Civil Reparations Trust Fund of a portion of the punitive damage award is not properly before the court because IBP raises this issue for the first time in their petition.

Supreme Court Rule 14(g)(i) requires the Petitioner to make a:

> specification of the stage in the proceeding, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears...so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the

judgment on a writ of certiorari.

IBP has utterly failed to make the required specification. There has been no allegation that this issue has ever been raised and it was plainly not addressed by the Supreme Court of Iowa. It is, therefore, not properly before the Court.

It is a fundamental rule of Supreme Court practice that a federal claim cannot be considered by the Court unless it has either been raised in the state court or considered and resolved in the state court. Yee v. City of Escondido, 503 U.S. 519, 532 (1992). When the state court fails to pass expressly upon a federal question "it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." Street v. New York, 394 U.S. 576, 582 (1969). See, Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537, 549-50 (1987), Adler v. Board of Education, 342 U.S. 485, 496 (1952), Raley v. Ohio, 360 U.S. 423, 434-36 (1959).

"This rule [requiring raising of the issue in the state court] serves an important interest of comity." Adams v. Robertson, 65 U.S.L.W. 4180, 4181 (1997). "It would be unseemly in our dual system of government to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider." Id. (internal quotation marks omitted) (citing Webb v. Webb, 451 U.S. 493, 500 (1981)).

The necessity to properly raise issues below is not insignificant:

> Our traditional standard also reflects practical considerations relating to this Court's capacity to decide issues. Requiring parties to raise issues below not only avoids unnecessary

> adjudication in this Court by allowing state courts to resolve issues on state law grounds, but also assists us in our deliberations by promoting the creation of an adequate factual and legal record.

Adams, 65 U.S.L.W. at 4181-82. Here, there is no information in the record or the decision below with which the Court could make a thoughtful analysis. The Court would be left to speculate regarding the validity of IBP's claim of abuse.

In addition to this fatal procedural posture, IBP has also failed to cite in its Petition the leading Iowa case upholding the constitutionality of Iowa Code § 668A.1 against a challenge on due process, double jeopardy and excessive fines grounds. See, Spaur v. Owens-Corning Fiberglas Corp., 510 N.W.2d 854 (Iowa 1994). The Spaur court found:

> a clear distinction between the [Civil Reparations Trust] Fund and the general state treasury. The damage awards are not commingled with state revenues and are to be disbursed only for the "purposes of indigent civil litigation programs or insurance assistance programs."
>
> We explained in Shepard [Components v. Brice Petrides et al., 473 N.W.2d 612 (Iowa 1991)] that "a plaintiff is a fortuitous beneficiary of a punitive damage award simply because there is no one else to receive it." Section 668A.1 "was designed to divert a portion of a resulting punitive damage award to a public purpose."

Id. at 868-69. The same result occurred in an excessive fines challenge in federal court. See, Burke v. Deere & Co., 780 F.Supp. 1225 (S.D. Iowa 1991), *rev'd on other grounds*, 6 F.3d 497 (8th Cir. 1993).

IBP incorrectly characterizes how the punitive damage award is apportioned in the statement of questions presented. It is not correct that "the State collects a 75 percent share of the punishment and pays the plaintiff's attorney's fees out of the punishment." (Pet. p. i) Under the Supreme Court of Iowa's conclusive interpretation of Iowa §668A.1, the State of Iowa only recovers punitive damages after the plaintiff has received 25 percent of the award and all applicable fees and costs have been paid, including attorney's fees. See, Fernandez v. Curley, 463 N.W.2d 5 (1990). The decision below applied the Fernandez rule. (App. pp. 33a-34a)

IBP has offered no explanation of how a private prosecution occurs given the divergence of interests between Wilson (who wants the entire punitive damage award) and the Fund (which wants its share). IBP wants nothing more than to have the Supreme Court rule that such a provision is per se unconstitutional. This argument has been waived, lacks support in the record, and is internally inconsistent.

E. IBP has limited the remedy it seeks in this Court to a determination of whether summary reversal is warranted

IBP has presented the Court with a petition specifically limited[2] to seeking summary reversal of the

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[2] IBP expressly requests summary reversal in the questions presented (Pet. p. i), the reasons for granting the writ (Pet. pp. 10, 16) and in its conclusion. (Pet. p. 22) In contrast, IBP requests plenary (continued...)

unanimous, en banc, decision of the Supreme Court of Iowa. The only question before the Court in considering the correct application of Gore is, therefore, whether the Court may exercise the extreme remedy of summary reversal, not whether plenary review may be granted.

It is up to the petitioner to phrase the questions presented for review. The Court has stated previously:

> A litigant seeking review in this Court of a claim properly raised in the lower courts thus generally possesses the ability to frame the question to be decided in any way he chooses, without being limited to the manner in which the question was framed below.

Yee, 503 U.S. at 535. The freedom granted by the Court carries with it the necessity to phrase the questions precisely, and define those issues on which review is sought:

> The framing of the question presented has significant consequences...because under this Court's Rule 14.1(a), "[o]nly the question set forth in the petition, or fairly included therein, will be considered by the Court." While "[t]he statement of any question presented will be deemed to comprise every subsidiary question fairly included therein," ibid., we ordinarily do not consider questions outside those presented in the petition for certiorari.

Id. (citing Berkemer v. McCarty, 468 U.S. 420 (1984)).

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[2](...continued)
consideration of its claim that Iowa Code § 668A.1 violates the due process clause. (Pet. pp. 18, 22).

Under this principle, IBP has waived any claim to plenary review as to whether the lower court decision was consistent with Gore. While a request for plenary consideration might include the subsidiary question of whether summary disposal on the merits would be appropriate, the reverse is not true. As the late Justice Marshall wrote:

> A summary reversal is a rare disposition, usually reserved by this Court for situations in which the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error.[3]

Schweiker v. Hauser, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting). Because IBP has only sought the subcategory of options for review, summary reversal, it has foregone any claim to plenary consideration on this issue. Although the decision of the Supreme Court of Iowa survives even the normal standard for granting the petition contained within

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[3] Petitioner cites the language of then-Justice Rehnquist that "summary reversal is appropriate in 'palpably clear cases of constitutional error.'" (Pet. p. 10) This citation somewhat disingenuously turns the standard expressed on its head. The full quote is:

> This Court each year reviews thousands of cases from the state courts, many of which, like this one, are characterized by less than perfect records. Reversal of state court judgments of conviction, especially in summary fashion, without argument, should be reserved for palpably clear cases of constitutional error.

Eaton v. Tulsa, 415 U.S. 697 (1974) (Rehnquist, J., dissenting).

Thus, as with the language of Justice Marshall in Schweiker, the rule of when summary reversal is appropriate is generally cast in negative terms, not the positive rule cited by Petitioner.

Supreme Court Rule 10, IBP's petition must be reviewed under the more stringent and extraordinary step of summary disposition.

Under this standard, and in light of the detailed and thorough application of the correct principles of law in the decision below, summary disposition is manifestly inappropriate. The petition should be denied.

Conclusion

Wilson respectfully requests the Court deny the Petition for Writ of Certiorari to the Supreme Court of Iowa.

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IN THE IOWA DISTRICT COURT FOR POTTAWATTAMIE COUNTY

KEVIN WILSON,	)	LAW NO. 64900
Plaintiff,	)	NOTICE OF APPEAL
V.	)	
IBP, inc. and DIANE ARNDT,	)	
Defendants.	)	

To Kevin Wilson, Plaintiff, Randall J. Shanks and David L. Brown his attorneys, and to the Clerk of this Court:

You are hereby notified that Defendants' (sic) IBP, inc. and Diane Arndt appeal to the Supreme Court of Iowa from the judgment entered in this case against them on April 30, 1997 and all Orders inhering in such judgment.

Please take Notice and govern yourselves accordingly.

Dated this 23 day of May, 1997

BELIN LAMSON McCORMICK ZUMBACH FLYNN, A Professional Corporation

By /s/ Mark McCormick

* * *

(filed May 27, 1997)

(3)

Supreme Court, U.S.
FILED
JUN 25 1997
CLERK

No. 96-1813

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

IBP, INC. AND DIANE ARNDT,

Petitioners,

v.

KEVIN WILSON,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Iowa

REPLY MEMORANDUM

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REPLY MEMORANDUM

Petitioners IBP, inc. ("IBP") and Diane Arndt respectfully file this memorandum in reply to respondent's Brief in Opposition ("Opp.") to certiorari.[1]

In their petition ("Pet."), IBP and Ms. Arndt demonstrated that the decision of the Iowa Supreme Court to levy a $2 million fine to punish conduct that caused $4,000 in presumed harm -- the exact 500-1 ratio struck down as unconstitutional in *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996) -- plainly violates the Due Process Clause of the Fourteenth Amendment as interpreted by this Court in *BMW* and should be summarily reversed. Petitioners also showed that the Court should grant plenary review to decide whether the award violates the Due Process Clause of the Fourteenth Amendment because a private plaintiff has pursued punitive damages on behalf of the State. Although respondent asserts that IBP "does nothing more than dispute how the Supreme Court of Iowa found facts and applied [*BMW*]," Opp. at 7, the facts as recounted by respondent himself illustrate that the Iowa Supreme Court's decision to increase the punishment in this case from the $100,000 approved by the trial court to $2 million was in flagrant disregard of this Court's

---

[1] On May 27, 1997, IBP filed a notice of appeal from the judgment entered by the trial court on remand. That appeal does not affect the finality of the Iowa Supreme Court judgment at issue in the petition, because it only involves pre-judgment interest determinations made by the trial court on remand. *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 479-80 (1975)

constitutional guidance in *BMW*. The Iowa court's failure faithfully to apply *BMW* to this case constituted the kind of "palpably clear . . . constitutional error" that justifies summary reversal. *Eaton v. City of Tulsa*, 415 U.S. 697, 707 (1974) (Rehnquist, J., dissenting). Respondent likewise offers no substantive argument in support of the constitutionality of Iowa's private prosecutor law, incorrectly asserting that petitioners did not preserve this due process challenge.

1. The reprehensibility of the conduct at issue in this case did not provide IBP with notice that the State of Iowa might impose a multimillion dollar penalty. Indeed, respondent totally ignores -- and therefore does not dispute -- the fact that this punitive damage award is the highest ever affirmed by an Iowa court in a reported decision and that the previous highest award was in a personal injury case where the plaintiff died and where compensatory damages were more than $1.4 million. *See* Pet. at 14 (citing *Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854, 857 (Iowa 1994)). More to the point, respondent fails to justify the Iowa Supreme Court's complete failure to compare the reprehensibility of the conduct in this case to other conduct for which punishment may be imposed, as it was required to do by *BMW*. *See BMW*, 116 S. Ct. at 1601. Although the Iowa court apparently concluded that IBP's conduct was reprehensible, it failed to follow *BMW*'s guidance by not calibrating the *degree* of reprehensibility in light of other punishable conduct. As a consequence, the court rendered "'reprehensibility' a concept without constraining force." *BMW*, 116 S. Ct. at 1606 (Breyer, J., concurring).

In an attempt to compensate for the Iowa court's failure to make such a reprehensibility comparison, respondent purports to compare the reprehensibility of IBP's conduct to

the conduct at issue in *BMW*, claiming that "[i]n every way [in] which BMW's conduct could be characterized as less wrongful, IBP's is more so." Opp. at 9. Even assuming for argument's sake that IBP's conduct is more reprehensible than was BMW's, that assumption hardly supports a $2 million penalty. This Court, of course, struck down the $2 million penalty in *BMW* as being unconstitutionally excessive. After reconsidering the facts of *BMW* in light of this Court's guidance, the Alabama Supreme Court concluded on remand that the constitutionally acceptable punishment for BMW's conduct was $50,000. *BMW of N. Am., Inc. v. Gore*, No. 1920324, 1997 WL 233910, at *16 (Ala. May 9, 1997). Thus, even if IBP's conduct could be said to be twice as reprehensible as BMW's conduct -- which is a stretch -- it would only merit a $100,000 punishment -- which was, incidentally, the remittitur ordered by the trial court in this case. Under no circumstances, however, can the reprehensibility of the conduct here justify a $2 million penalty, a conclusion that the Iowa court surely would have reached if it had faithfully applied *BMW*.

2. In an effort to heighten the level of reprehensibility, respondent strains mightily to assert that IBP's conduct endangered Mr. Wilson's health and safety. There in fact was no evidence -- and respondent points to none -- that Mr. Wilson suffered any physical harm from the conduct at issue in this case,[2] that any medical care that he received

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[2] Indeed, respondent asserts that "IBP caused physical harm in the manipulation of the medical care provided Wilson by delaying his needed back surgery." Opp. at 10. Not only does respondent fail to provide any citation to support this assertion (because it is totally unsupported by the evidence), he is forced to admit in the very next sentence that "his disc did *not* rupture

was below the standard of care, that he had been denied any workers' compensation benefits, that any other employee of IBP ever had suffered physical harm as a result of the conduct at issue in this case (or even as a result of similar conduct), or that any other employee ever had received medical care that was below the standard of care as a result of the company's workers compensation policies. The sum total of the conduct at issue in this case -- for which the Iowa Supreme Court imposed a $2 million fine -- was that Ms. Arndt allegedly defamed Mr. Wilson to one of his treating physicians, causing $4,000 in presumed damages to Mr. Wilson's reputation, and that this defamation allegedly was a product of a (completely lawful) "climate of suspicion" of injured workers' claims said to exist at IBP. Neither respondent nor the Iowa Supreme Court has reconciled the reprehensibility of this conduct with a $2 million penalty.[3]

3. Similarly unavailing is respondent's attempt (Opp. at 15) to excuse the Iowa court's dismissal of the second *BMW* guidepost -- ratio of punitive damages to actual harm -- as being "[o]f minor significance." Indeed, both cases that respondent cites in his effort to justify the 500-1 ratio in this case actually demonstrate the Iowa court's palpable

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further and cause more neurological problems." *Id.* (emphasis added).

[3] Respondent asserts that IBP employees falsified OSHA records, but there was no evidence that any record pertaining to Mr. Wilson was falsified, that he suffered any harm from any such alleged falsification or that any other worker suffered any harm as a result of such purported conduct. Moreover, the maximum criminal fine for such an act -- assuming for argument's sake that IBP could even be punished for it in this case -- is $10,000. 29 U.S.C. § 666(g).

error in refusing to accord weight to this factor. Respondent invokes the Seventh Circuit's opinion approving a $60,000 punishment where compensatory damages amounted to $5,000. Opp. at 13-14 (citing *Cooper v. Casey*, 97 F.3d 914, 919-20 (7th Cir. 1996)). This result obviously reinforces petitioners' fundamental point: an award of $2 million is grossly out of proportion to (presumed) actual harm of $4,000; an award of $60,000 would be within a constitutionally acceptable range. Respondent's reliance on *Lee v. Edwards*, 101 F.3d 805 (2d Cir. 1996), is also misplaced. *See* Opp. at 14. In *Lee*, the actual damages were only nominal, leading the Second Circuit to conclude that use of a multiplier was not meaningful. *Lee*, 101 F.3d at 811. Thus, the court looked to punitive damage awards in similar cases "to find limits and proportions" and concluded that $125,000 was the appropriate punishment. As pointed out above, neither the Iowa court nor respondent pointed to any comparable Iowa case in which a multimillion dollar punishment was imposed. Moreover, *Lee* illustrates that the appropriate magnitude for punishment in cases where actual damages are nominal (or, as in this case, de minimis) is in the tens of thousands, *not* in the millions.

4. The Iowa Supreme Court did not even mention the third *BMW* guidepost: comparison to legislatively established penalties. Respondent himself attempts to avoid the guidepost by asserting that "the conduct at issue is not covered by any statutory measure." Opp. at 15. This assertion simply misses the point that in Iowa, a corporation that commits a serious misdemeanor causing $4,000 in harm faces a maximum fine of less than $10,000, while IBP, which committed no crime whatsoever, is being fined $2 million. There is no provision anywhere in the law of Iowa that put IBP on notice that it could be fined $2 million for the conduct at issue in this case, and the complete

failure of the Iowa Supreme Court to take that lack of notice into account in assessing punitive damages in this case illustrates its flagrant disregard for the constitutional guidance articulated by this Court in *BMW*.

5. Respondent makes no argument whatsoever on the merits of Question 2 of the Petition, resting instead on the claim that petitioners did not preserve their due process claim. First, the Iowa Supreme Court specifically (though inadequately) addressed the constitutionality of the punishment under the Due Process Clause in its opinion. Appendix to the Petition ("App.") at 24a. "There can be no question as to the proper presentation of a federal claim when the [court below] passes on it." *Raley v. Ohio*, 360 U.S. 423, 436 (1959). Moreover, petitioners vigorously argued in their petition for rehearing that the Iowa Supreme Court's decision to disapprove the $100,000 remittitur ordered by the trial court and to assess instead a $2 million penalty violated the Due Process Clause. *See* Appellees/Cross-Appellants' Petition for Rehearing 6-9 (arguing that the supreme court's "ruling denies IBP due process of law under the Fourteenth Amendment of the United States Constitution").

Respondent appears to confuse a due process "claim" with the particular "arguments" made in support of such a claim. On this point, respondent seeks support from *Yee v. City of Escondido*, 503 U.S. 519 (1992), but *Yee* directly supports petitioners. In *Yee*, this Court would not consider whether a statute denied substantive due process because "petitioners did not raise a substantive due process *claim* in the state courts, and no state court has addressed such a *claim*." *Id.* at 533 (emphasis added). But the *Yee Court* also expressly recognized that "[o]nce a federal claim is properly presented, a party can make *any argument* in

support of that claim; parties are not limited to the precise arguments they made below." *Id.* at 534 (emphasis added).

In this case, petitioners clearly raised a due process claim before the Iowa Supreme Court. Question 2 simply sets forth another argument in support of that claim and it is properly before this Court.[4]

CONCLUSION

The Iowa Supreme Court was obligated faithfully to apply this Court's guidance in *BMW* to this case, an obligation that it manifestly failed to fulfill. The petition for a writ of certiorari therefore should be granted and the case either summarily reversed in light of *BMW* or set for plenary consideration.

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[4] Respondent faults petitioners for stating in the Question Presented that "the State collects a 75 percent share of the punishment and pays the plaintiff's attorney's fees out of the punishment." Opp. at 24. This criticism is unfounded, given that respondent's counsel specifically argued to the jury when seeking punitive damages that 75 percent of the punitive award would go to the State. (Tr. 336)

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Respectfully submitted,

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